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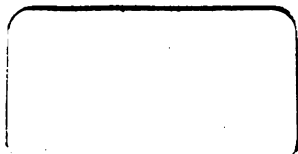
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OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LIII.

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§ Appointed by the Governor, November, 1868, to fill the vacancy caused by the resignation of Judge DAVIS.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* EDWARD L.
MOLINEUX.

The governor has no power, during a recess of the senate, and without its consent, to appoint a major-general of the State National Guard, to fill a vacancy occurring, in time of peace.

The act of 1849, "to provide for filling vacancies in office," was passed to provide for the filling of vacancies in elective offices, only.

There is either a *casus omnisus* in the statute, on this subject, or the legislature has intentionally left a vacancy in the office of major-general occurring in time of peace, to be filled in the ordinary way, viz. by a simple devolution of the command upon the officer next in rank. *Per* GILBERT, J.

The statements contained in the headings to the chapters, titles and articles into which part 1 of the Revised Statutes is divided, of the subjects to which they respectively relate, are a part of the law itself, and not in any wise extrinsic to the enacting clause. Their office is solely to control, limit and apply the succeeding provisions of the statute. And effect should be given to them, according to their fair and ordinary import and understanding.
Per GILBERT, J.

The People v. Molineux.

QUO WARRANTO against Edward L. Molineux, claiming the military office of major-general of the second division of the National Guard of the state of New York, under an appointment made by the governor, August 31, 1868, during the recess of the senate.

The complaint alleged that the defendant, on the 22d day of September, 1868, at the city of Brooklyn, in the county of Kings, did usurp, intrude into, and unlawfully hold and exercise the military office of major-general of the second division of the National Guard of the state of New York. Wherefore, the plaintiffs demanded judgment, that the defendant was not entitled to the said office of major-general, and that he be ousted therefrom, with costs.

The defendant, in his answer, denied each and every allegation in the complaint contained, and alleged that he, the defendant, at the time and place in said complaint mentioned, was and still is major-general of the second division of the National Guard of the state of New York, duly appointed, and commissioned and qualified, and that by virtue thereof he, the defendant, entered upon and exercised the duties of said office.

For a further, separate, and distinct answer and defense to said action, the defendant alleged that during the recess of the senate of the state of New York, and on or about the 31st day of August, A. D. 1868, a vacancy happened in the office of major-general of the second division, National Guard of the state of New York, to which an appointment had been made by the governor of said state, with the consent of the senate, and that thereupon the governor duly granted to the defendant a commission as major-general aforesaid, and that no meeting of the senate of the state of New York had been since had or held.

On the trial at the Kings' circuit, before Justice GILBERT and a jury, the following facts were stipulated and agreed upon :

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1. That on the 14th day of July, 1868, the resignation of Major-General Harmanus B. Duryea, second division of the National Guard of the state of New York, was duly accepted by the governor of said state, whereby a vacancy happened in said office.

2. That on said day there existed, and still exists, a recess of the senate of the state of New York.

3. That on the 31st day of August, 1868, and during such recess, a vacancy happened in the office of major-general of the second division, National Guard of the state of New York, to which an appointment had been made by the governor of the state of New York, with the consent of the senate, to wit, the appointment of said Harmanus B. Duryea.

4. That the papers purporting to be an appointment and commission, annexed to said stipulation, and marked "A" and "B" respectively, are under the hands and seals of the officers therein stated.

5. That said defendant qualified by taking the oath of office, under said papers, purporting to be commission and appointment order marked "C," and each of them, and filed the same.

6. That said defendant claimed to assume command of said second division, under and by virtue of said alleged appointment order marked "C," and commission and qualification, and each of them.

7. That no meeting of the said senate of the state of New York has, since said 14th day of July, 1868, been had or held.

8. The paper "B," called commission, was not actually made out at the adjutant-general's office and signed, until after September 23, 1868.

9. That it was not received by the defendant until after the 23d of September, 1868.

10. An order, numbered special order No. 96, was made and entered at the time of its date.

The People *v.* Molineux.

This order here follows :

“General Headquarters, State of New York, Adjutant-General’s Office, Albany September 1, 1868. Special Orders, No. 196. 1. Edward L. Molineux having been appointed to the office of major-general of the second division, National Guard, in the place of Major-General Harmanus B. Duryea, resigned, he will be obeyed and respected accordingly. 2. Brigadier-General Philip S. Crooke, of the fifth brigade, is hereby relieved from the command of the second division, and will transfer the same, together with all books, papers and other property belonging thereto, to Major-General E. L. Molineux, and will resume the command of his brigade. By order of the commander-in-chief.

(Signed) S. E. MARVIN, Adjutant General.”

The defendant then rested. The counsel for the defendant moved that the complaint be dismissed, on the following grounds : 1st. That no cause of action has been proved or established against the defendant. 2d. That it affirmatively appears, from the evidence that the defendant was lawfully in the possession of the office of major-general of the second division of the National Guard, and lawfully exercising the functions and duties pertaining to that office at the time of the commencement of this action.

The court denied the motion, and the defendant’s counsel excepted. The court then ordered the jury to find a verdict for the plaintiffs, and the defendant excepted.

Whereupon the jury found a verdict for the plaintiffs, and judgment was entered for the plaintiffs, and against the defendant.

Philip S. Crooke, for the plaintiffs.

King & Lathrop, for the defendant.

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GILBERT, J. This is an action in the nature of *quo warranto*, to try the title of defendant to the office of major-general of the second division of the National Guard of this state. The jury, under the direction of the court, rendered a verdict for the people, and the case was then reserved for further consideration. No question was made that the case is one within the provisions of the statute of *quo warranto*, or that the action is in due form. (*Code*, § 432.) The defendant was appointed by the governor during the present recess of the senate, upon the happening of a vacancy occasioned by the resignation of the previous incumbent, Major-General Duryea. I have little hesitation in saying that the formalities requisite to invest the defendant with the office have been performed. The sole question in the case, therefore, is whether the governor had the power to make the appointment without the consent of the senate; and this, in my opinion, depends upon the question whether there is a statute authorizing this mode of filling the vacancy, except in time of war. The provisions of the constitution on this subject exclude all implication of power in the governor, *virtute officii*. Section 3 of article 11 ordains that "the governor shall nominate, and, with the consent of the senate, appoint all major-generals," &c. This language is too plain to admit of any doubt that the consent of the senate is essential to the validity of an original appointment. Section 5 of article 10, confers upon the legislature the power, and makes it their duty to provide for the filling of vacancies in office. This is necessarily exclusive of the governor. Whatever other powers, therefore, he may possess, as commander-in-chief, these specific powers of appointment and of filling vacancies have not been conferred upon him by the constitution, but on the contrary have been thereby carefully withheld from him and deposited elsewhere. Upon the trial, evidence was given to show that the power in question

The People v. Molineux.

had been exercised by the predecessors of the present executive. In a case involved in any doubt, this fact would deserve to have great weight; but otherwise it is entitled to very little consideration, in a legal point of view. To come at once to the question presented, I have been able to find only two statutes which have any bearing upon it, and these are the only ones cited by the learned counsel for the defendant. The first is chapter 28, of the laws of 1849, entitled, "An act to provide for filling vacancies in office." That act provides, that "Whenever vacancies shall exist, or shall occur in any of the offices of this state, where no provision is now made by law for filling the same, the governor shall appoint some suitable person who may be eligible to the office so vacant or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election, after the happening of the vacancy at which such officer could be by law elected; and the person so appointed to fill such vacancy shall possess all the rights and powers, and be subject to all the liabilities, duties and obligations of such officer, as they are now or may hereafter be prescribed by law," &c. In the instance before me, there was not any exercise of the power conferred by this statute. The appointment of the defendant is not to perform the duties of the office temporarily, but is a full and complete appointment to the office itself. But I am of opinion that this statute does not apply to the case. In the first place the statute limits the duration of appointments under it to the commencement of the political year next succeeding the annual election after the happening of the vacancy, at which by law, such officer could be elected. In the case of a major-general, this period would never arrive. The tenure of that office is not restricted to any specified time. Upon a literal construction of the statute, therefore, an execution of the

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power thereby granted would be equivalent to a permanent appointment, which would be in direct contravention of the provision of the constitution before cited, requiring the consent of the senate to such an appointment. In the second place, the law has always provided for filling vacancies in the office of major-general, by devolving the command upon the officer belonging to the division next of rank; and, finally, regarding the intention of the legislature, it is quite evident to my mind, that this statute was passed to provide for the filling of vacancies in elective offices only. The other statute cited is part 1, chapter 5, title 6, article 4, section 42 of the Revised Statutes. (1 *R. S.* 123.) It is not disputed that this statute is in force. The language of section 42, taken by itself, would clearly embrace this case. But the heading or inscription to chapter 5, in which this section is contained, is "of the public officers of this state *other than militia or other town officers,*" &c. Much effort was spent, and many authorities cited, to show that the title of an act cannot control the plain words contained in the body of the statute. Subject to the qualification that, "the words, if they be general, and not express or precise, shall be restrained unto the fitness of the matter or person," this rule of interpretation is correct. But the inscription to chapter 5 is not in any sense a title to a statute. It forms a part of the body of the act quite as much as the section cited, and it was inserted for the purpose of controlling and limiting the scope and application of the general words used in the chapter. Part 1 of the Revised Statutes was passed as one act. (*Laws of 1827, 2d session, ch. 9; Id. 1828, 2d session, ch. 20.*) The title and preamble of this act are in these words: "An act concerning the territorial limits and divisions, the civil polity, and the internal administration of this state. Whereas it is expedient that the several statutes of this state, relating to its territorial limits and divisions, its civil

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polity, and its internal administration, should be consolidated and arranged in appropriate chapters, titles, and articles; that the language thereof should be simplified, and that omissions and other defects should be supplied and amended; therefore the people of the state of New York, represented in senate and assembly, do declare and enact as follows," &c. Then follow the chapters, titles and articles into which the act is divided, each containing a preliminary statement of the subjects to which they respectively relate. In this form of enactment such statements are a part of the law itself, and not in any wise extrinsic to the enacting clause. Their office is solely to control, limit, and apply, the succeeding provisions of the statute. To reject them, or refuse to give effect to them, according to their fair and ordinary import and understanding, would be to make the law, not to administer it. The rule I have thus laid down has, so far as I know, been uniformly applied to the Revised Statutes, and has also been followed in respect to the Code of Procedure. (*Williams v. The People*, 45 Barb. 201.) I have thus briefly intimated the results of the examination which I have been able to give to the case. It follows that, either there is a *casus omissus* in the statute on this subject, or the legislature have intentionally left the vacancy in the office of major-general, occurring in time of peace, to be filled in the ordinary way, namely, by a simple devolution of the command upon the officer next in rank. I think the latter alternative is most probable, being more consonant with the nature, organization and objects of the militia system. In time of war the governor is expressly vested with the power of appointment, in case a vacancy occurs. (*Laws* 1862, p. 899, § 85.) And it seems to me that the legislature, while framing a code of laws on this subject, did, by making the exercise of this power to depend upon such an exigency, evince a clear intention not to intrust the power to be exercised in time of peace. But if a *casus*

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omissus exists, the court has no power to supply it. My conclusion is that the people are entitled to judgment.

Judgment accordingly.

[KINGS SPECIAL TERM, October 28, 1868. *Gilbert*, Justice. The above decision was affirmed, *pro forma*, at a general term held in Kings county, December, 19, 1868, LOTT, P. J. and J. F. BARNARD, GILBERT and TAPPAN, JJ. present; and it was affirmed unanimously by the Court of Appeals, March term, 1869.]

PRINGLE vs. SPAULDING.

The statute of frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred, where the principal adopts the act of the agent.

An authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal.

In an action to recover damages for the breach of a contract to sell real estate, the proper rule of damages is the amount paid by the purchaser, on executing the contract, together with the difference between the contract price and the actual value of the premises, at the time the contract was to have been performed.

THIS is an action to recover damages for the non-performance of an agreement for the sale of real estate. The agreement was signed on behalf of the defendant by one Poillon, a real estate broker, who testified that he called on the defendant, who told him "that the price was \$5500; that \$4000 could remain on the property, but if I could sell it so as to get \$2500 cash in place of \$1500, he would be very much pleased;" and after the agreement was signed, Poillon met the defendant and told him he had sold the property agreeably to his terms, receiving \$2500 in money instead of \$1500. He said "all right," and passed on. Again, he testified: "I called on the defendant to get a

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chance to sell it. He authorized me to sell it and gave me the terms." Again, "I wrote him a letter before I saw him. He called at my office then, and that was my first interview with him. That was when he gave me the terms as I have stated, and nothing further took place between us before the signing of the contract that I can recollect. He wanted me to sell it on these terms, if I could." On the day of the contract, the broker gave the defendant written notice of it. At the conclusion of the plaintiff's testimony the defendant moved for a verdict on the ground that no authority had been shown in Poillon to execute a written contract for the sale of the premises, and that no ratification of such contract by the defendant had been shown. Which was denied, and the defendant excepted.

At the conclusion of the case, the court charged the jury that if authority was given to Poillon, as he stated, to sell the property, he had power to execute the written contract and bind his principal. To this the defendant excepted.

The court further charged the jury that if the defendant was liable at all, he was bound, not only to refund to the plaintiff the \$100 paid by him, but was liable also for the difference between \$5500, the contract price, and the actual value of the premises at the time the contract was to have been performed. To this ruling and charge of the court the defendant duly excepted.

The jury rendered a verdict in favor of the plaintiff for \$250.

The defendant thereupon made a motion for a new trial upon the minutes of the judge, which motion was denied by the court, and the defendant duly excepted to such decision.

The defendant appealed from the judgment, and from the order denying motion for a new trial.

Geo. G. Reynolds, for the appellant. I. The court charged that "if authority was given to Poillon, as he

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states, to sell the property, he had power to execute the written contract and bind his principal." This leaves out any question as to ratification of the contract, (about which there was a conflict of evidence,) and makes the plaintiff's case to stand on the agent's original authority. We submit the charge was wrong. There was nothing in the terms of Poillon's employment, as stated by himself, giving him more than the usual powers of a broker. The defendant gave him the terms, in part, and wanted him to sell it, if he could. Sell it how? of course as a broker; that was his business; not as attorney, for he was not employed as such. It is the most ordinary expression to speak of employing a broker to sell, but of course it is perfectly well understood that his business is simply to negotiate. Even the signing of a contract is not a *sale*, strictly speaking, because real estate is sold only by deed. This shows that the term "sell" is used in another sense. Poillon knew, at the time, that the property was in the hands of another broker for sale, and might be sold by him. He does not dispute the defendant's testimony that he so told him at the time of the employment. The terms of the mortgage were not fixed; there were other particulars to be adjusted by the contract, and which were not left to him. It was, therefore, erroneous to charge the jury, as matter of law, that absolute power was given to close a contract, without reference to the principal; to say the least, it was for the jury to construe the language in the light of the circumstances, and say whether the employment was intended by the defendant, or accepted by Poillon as giving such power. A broker, *as such*, has no power to sign the contract. He has performed his whole duty (and therefore exhausted his powers) when he produces a suitable customer upon the terms given. If he goes further it must be as *attorney*, and not as broker. (*Coleman v. Garrigues*, 18 Barb. 60, 67, 68. *Glentworth v. Luther*, 21 *id.* 145, 147.) In both these cases the broker

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was employed "to sell." In the first case some proof was given of custom, but that is not made a point in the decision; in fact, it is not even alluded to in the opinion. Such proof is supererogatory. (*See last case, p. 147; also Barnard v. Monnot, 33 How. Pr. 440.*)

II. The charge, as to the rule of damages, and the refusal to charge as requested on that subject, was erroneous. In the absence of fraud or willful violation of the contract the rule is the same as in eviction after conveyance, to wit, the recovery of the price paid, with interest. (*Baldwin v. Munn, 2 Wend. 399, 405, 406. Peters v. McKeon, 4 Denio, 546. Conger v. Weaver, 20 N. Y. Rep. 140.*) The defendant refused to convey to the plaintiff, because he was, or supposed himself to be, under superior obligations to another party who paid \$250 less. It may be said it was his own folly to create conflicting obligations; so it is a man's own folly to agree to make title when he has none; but the above rule applies in all cases where there is an absence of fraud or willful violation of contract.

D. P. Barnard, for the respondent. I. It is not necessary that the authority of an agent to make a written contract should be in writing. An authority to sell, carries with it the power to make a binding contract. (*Dykens v. Townsend, 24 N. Y. Rep. 57. Nelson v. Cowing, 6 Hill, 338. 2 Kent's Com. 796. McWhorter v. McMahon, 10 Paige, 386.*)

II. The rule of damages as laid down by the court was correct. (*Trull v. Granger, 4 Seld. 115. Brinckerhoff v. Phelps, 24 Barb. 100. Bush v. Cole, 28 N. Y. Rep. 261.*)

By the Court, GILBERT, J. The statute of frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred, where the princi-

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pal adopts the act of the agent. (*More v. Snedburgh*, 8 Paige, 606. *McWhorter v. McMahan*, 10 id. 386. *Lawrence v. Taylor*, 5 Hill, 107. *Newton v. Bronson*, 3 Kern. 594.) Whether an authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract, is the question presented.

In *Coleman v. Garrigues*, (18 Barb. 68,) this court held that "an agent within the meaning of the statute of frauds, who can sign the name of the owner of lands to a contract of sale, is not one who has a mere authority to make a bargain for a sale, but one who is made the owner's agent to sign his name to the contract. That agency is not included in a mere authority to sell." A similar view was expressed in *Glentworth v. Luther*, in this court, (21 Barb. 145,) and by the Court of Appeals in *Barnard v. Monnot*, 33 How. Pr. 440.) The cases of *McWhorter v. McMahan*, and of *Lawrence v. Taylor*, (*supra*,) afford some countenance to this position. In those cases the authority, which one partner possesses by virtue of the partnership relation, in respect to land belonging to the partnership, was evidently deemed insufficient to authorize him to sign a contract of sale in the name of his copartner. But it has been repeatedly held that an express power to sell, given to an auctioneer, embraces the requisite authority to sign the contract of sale. Thus in *Tallman v. Franklin*, (14 N. Y. Rep. 591,) this language is used: "The auctioneer was the agent of the owner of the lots, to effect the sale, and was lawfully authorized to sign the writing required by the statute of frauds, to give validity to it." In *Champlin v. Parish*, (11 Paige, 411,) the chancellor held that "the auctioneer was the agent of the complainants in making the sale, and that he was probably authorized by them to execute a written agreement to the purchaser as such agent, so as to make the contract binding on them." And in *Dykers v. Townsend*, 24 N. Y.

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Rep. 57,) which involved the effect of that provision of the statute of frauds relative to contracts for the sale of goods, which requires a note or memorandum of the contract, to be subscribed by the party to be charged thereby, or by the lawful agent of such party, it was held that the subscription of an agent, who had authority to purchase stock, "was a sufficient compliance with the statute, according to the settled construction which had been given to it." The broad proposition, on which the case of *Coleman v. Garrigues*, was decided, therefore, cannot be sustained consistently with these cases, or with the principle which is frequently asserted as being elementary in the law of agency, namely, that an authority to do an act, includes an authority to employ whatever means are necessary to accomplish a due execution of the power.

We have been much impressed with the argument, that even an express power to sell, given to a real estate broker, means less than the words import, and ought to be restricted within the limits of his ordinary duty as a broker, which is, to find a purchaser who is willing to accept the terms of the seller. But it is difficult to assign any satisfactory reason why any different effect should be given to the language of the power, when given to a broker, than when given to an auctioneer. The duty of both is to procure a purchaser, the auctioneer by attracting a crowd and inducing bids, and the broker by hunting for a purchaser and persuading him to purchase. The lack of the specific power to sign the contract can be inferred with no more reason in the one case than in the other. This construction is, no doubt, attended with danger of frauds and perjuries, but it must rest with the legislature to change the law, if any change shall be necessary.

If these views are correct, the defendant was bound to perform the contract, and his having incurred a conflicting obligation in respect to the subject of the sale, affords

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no excuse for his refusal to perform, in a legal point of view.

The rule of damages laid down by the court was, therefore, correct.

The judgment and order denying a new trial should be affirmed, with costs.

[KINGS GENERAL TERM, December 19, 1868. *Lott, J. F. Barnard, Gilbert and Tappan, Justices.*]

AMOS A. SHELDON vs. SAMUEL HORTON, impleaded, &c.

Any act of an indorser of a promissory note, calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done, is, in judgment of law, a waiver of demand and notice.

Thus, where the holder of a note told the indorser, sixteen days before it fell due, that the maker wanted the note to remain another year, and asked him if he was willing, and the indorser replied that he was willing to let it remain, and at the same time took the note and looked it over, and said it was a good note; *Held* that this excused a demand, and notice of non-payment.

THIS was an action on a promissory note for \$400, made by William H. Horton, on the 3d day of May, 1865, payable to Niles Knickerbocker, or bearer, one year after date, with interest at six per cent, and indorsed by Samuel Horton. The action was brought against maker and indorser, jointly, but Samuel Horton, the indorser, only, appeared. On the 19th day of April, 1866, Henry H. Sheldon, the then holder of the note, transferred and delivered it to the plaintiff, who became the holder and owner thereof. On the same day, and previous to the delivery of the note to the plaintiff, Henry H. Sheldon went to the defendant Samuel Horton, and told him he had the note, and that William H. Horton wanted it to lie another year. He asked Samuel Horton if he

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was willing, and he said he was; he looked it over and said it was a good note. The note was then passed to the plaintiff, and was permitted to run another year, without any demand being made. At the expiration of said year, to wit, on the 3d day of May, 1867, the plaintiff, being still the holder and owner of said note, demanded payment of the same from William H. Horton, which being refused, he notified Samuel Horton, the same day, that he should look to him for payment.

No part of the note having been paid, this action was brought for the recovery of the amount due thereon.

On the trial at the circuit, the above facts were established, and a verdict found by the jury, for the plaintiff, against both defendants, and judgment entered accordingly. The defendant Samuel Horton moved, upon the minutes of the judge, to set aside the verdict, and for a new trial; which motion was denied. And from the judgment and order the said defendant Samuel Horton appealed.

Homer A. Nelson, for the appellant. I. The exceptions taken to the rulings of the judge are well taken. The conversation of the 19th of April did not amount to a waiver of demand of payment of the maker of the note and notice of non-payment to the indorser. A stipulation of the indorser to waive notice does not dispense with the demand. They are distinct acts, each a condition precedent to the right of recovery. (6 *Mass. R.* 524.) Parol testimony to show that an indorser, at the time of indorsing, agreed that he would be liable, notwithstanding the holder should omit to present for payment and give him notice of non-payment, is inadmissible, because it goes to contradict the contract of indorsement. (*De Groot v. Blake*, *Anth. N. P.* 299.) Nothing short of the clearest evidence of assent, express or implied, on the part of indorsers of a promissory note will amount to a waiver of notice of pro-

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test. (*Oswego Bank v. Knowler*, Hill & D. Supp. 122.) As to "waiver of protest," see *Coddington v. Davis*, (3 Denio, 17, and 1 Comstock, 186.) A written waiver of notice of protest does not amount to a waiver of presentment to the maker at its maturity, and demand of payment. (*Buckley v. Bentley*, 42 Barb. 646; also see *Coghlan v. Dinsmore*, 9 Bosw. 453.) Insolvency of the maker is no excuse. (12 Wend. 110.) By the most liberal construction the most that can be claimed is, not that the defendant waived demand and notice, but that he assented that it "should remain another year;" in other words, that it should be payable two years from date instead of one year from date, and this was so understood by the plaintiff, for he undertook to charge Samuel Horton as indorser on the 3d of May, 1867.

II. The demand of payment and notice of non-payment made on the 3d of May, 1867, were nugatory. If it "stood another year" it would fall due May 6, 1867, that being the last day of grace. In *Griffin v. Goff*, (12 John. 423,) the note was demanded on the day named for payment, and notice given to the indorser on the third day, the last day of grace, and it was held that the demand on the day named was nugatory. The notice to the indorser was a nullity for want of a demand on the last day. The maker as well as the indorser is entitled to the three days' grace. (*Hogan v. Cuyler*, 8 Cowen, 203.) A suit commenced on the third day of grace is premature, although the note was previously on that day demanded and payment refused. Notwithstanding the demand and refusal, the maker has all of the third day to seek the holder and make payment. (*Osborn v. Moncure*, 3 Wend. 170.) Same ruling where suit was commenced after banking hours on the third day of grace on a note payable at a bank. (*Smith v. Aylesworth*, 40 Barb. 104.)

III. A new trial should be granted to this appellant on the evidence. The facts sworn to by Henry Sheldon

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being positively denied by the defendant, this indorser should not be deprived of his legal rights, as such, by reason of the evidence in this case.

M. Anthony, for the respondent. I. The consent by the indorser, Samuel Horton, before the maturity of the note, to have the time of payment extended for one year, operated as a waiver of his right to have demand made and notice given him of its non-payment by the maker. (*Edw. on Bills and Prom. Notes*, 633. 1 *John. Cas.* 99. 10 *Wend.* 504. 13 *Barb.* 163. 4 *Campb.* 285.)

II. The delay in requiring payment of the note by the maker during the period of one year being with the consent of the indorser, the latter is not thereby discharged from his original liability. (17 *John.* 58. 1 *Caines*, 121. 12 *East*, 38.)

III. The implied waiver, by the indorser, of demand and notice, being equivalent to due notice, his liability is thereby fixed, and no subsequent valid agreement between holder and maker, for giving time, is necessary. The delay is at the will of the holder during the period covered by the consent of the indorser. (18 *East*, 430. 17 *John.* 176. 18 *id.* 327.) If the drawer be consulted and his assent be given before any arrangement is made, he is a party to the contract extending the time of payment, and cannot complain of the delay. (3 *Car. & Payne*, 456. 6 *Conn. R.* 444.)

IV. Although no consideration for the delay is shown in this case, still it has been decided that a mere agreement with the drawer for delay without any consideration for it, and without any communication with, or assent of the indorser, is no discharge of the latter after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. (12 *Wheat.* 554.) In this case the assent of the indorser to the delay takes the place of demand and notice in fixing his responsibility.

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By the Court, GILBERT, J. We are of opinion that the case was correctly disposed of at the circuit. Any act of the indorser, calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done, is, in judgment of law, a waiver of demand and notice. (*Phipson v. Kneller*, 1 Stark. 116. *Leffingwell v. White*, 1 John. Cas. 99. *Spencer v. Harvey*, 17 Wend. 489. *Bruce v. Lytle*, 13 Barb. 167. *Taylor v. French*, 4 E. D. Smith, 458. *Amoskeag Bank v. Moore*, 37 N. H. Rep. 539. *Ridgway v. Day*, 13 Penn. R. 208. *Barclay v. Weaver*, 19 id. 396.)

Phipson v. Kneller was this. Three days before the bill became due, Kneller, the drawer, upon inquiry made by the holder, told him that the bill, when due, would not be paid by the acceptor, and said he would not give his own address, but would call in a few days and inquire whether the bill had been paid or not. Lord Ellenborough held that "no legal proposition can be more clear than that, when a party says, my residence is immaterial, I will inquire whether the bill is paid, he thereby dispenses with notice."

In *Leffingwell v. White*, the indorser called on the holder just before the note became due, and proposed to give his own note for the amount, which was assented to, and during the negotiation between them, the note fell due. It was held that the pending negotiation dispensed with demand and notice. In *Spencer v. Harvey*, the indorser wrote to the holder, a few days before maturity, stating that the maker had failed, acknowledging his liability and asking indulgence. This was held to be a waiver of demand and notice. In *Bruce v. Lytle*, it was held that a promise made by the indorser to the holder, the day before the note fell due, that "he would be up there three or four days afterwards, and pay the note and take it up," was sufficient to dispense with demand and notice. In *Amoskeag Bank v. Moore*, the indorser, a few days before

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the maturity of the note, signed the following agreement at the foot of the note: "Septbr. 25, 1855. We hereby agree that the above note may be extended for sixty days from this date." It was held that no demand was necessary.

In *Ridgway v. Day*, the holder wrote to the indorser before maturity, informing him that the maker could not probably pay, and offering to extend the time of payment, and the indorser replied he was "willing to extend the time for thirty days longer, and of course will stand responsible for the payment of the note as originally intended." Held a waiver of all demand and notice. In *Barklay v. Weaver*, the same effect was given to a parol agreement to extend the time of payment.

In the case before us, the holder told the defendant sixteen days before the note fell due, that the maker wanted the note to remain another year, and asked him if he was willing. The defendant replied, that he was willing to let it remain, and at the same time took the note and looked it over, and said it was a good note. After such an arrangement for extending the time of payment, a demand and notice would have been useless, and in contravention of the object and intention of the parties. And it is contrary to good faith, to set up as a defense a want of demand and notice, which had been caused by the forbearance of the plaintiff.

The judgment and order denying a new trial should be affirmed, with costs.

[KINGS GENERAL TERM, December 19, 1868. *Lott, J. F. Barnard, Gilbert and Tappan*, Justices.]

ELIZA MALONEY vs. JOHN HORAN, impleaded, &c.

The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel.

When the deed of the husband has been avoided, at the suit of creditors, on the ground that it was made with intent to hinder, delay or defraud them, there remains an estate in the fraudulent grantee, which is sufficient to support or feed this estoppel; for the fraudulent deed is good and effectual as between the parties to it. A payment by the fraudulent grantee or grantor to the creditors, of their debts, would extinguish the same, and render his title valid.

Whatever consequence may ensue from proceedings by the creditors *in invitum*, upon the estate fraudulently conveyed, is attributable to the statute, which, in conjunction with the decree, acts directly upon such estate, and divests so much thereof only, as may be necessary to obtain satisfaction of the claims of creditors; and the wife's dower in that part of the estate so divested will be as effectually barred as in the part which may remain vested in the fraudulent grantee. There cannot, in the nature of the case, be any severance.

And so if the whole estate be taken away; because this results from the enforcement of the remedy, and not because the fraudulent deed conveyed nothing to the grantee.

Where a wife, after having knowingly and designedly participated in her husband's fraud, by joining with him in conveying his land to a third person, for the purpose of defrauding his creditors, takes from such fraudulent grantee a conveyance of the same premises, the court will not help her to undo the consequences of her acts, one of which was to accept a merger of her dower, in the fee conveyed to her.

As a wife cannot be endowed of her own lands, the taking of such a conveyance will destroy the claim, if any, which previously existed.

Where the plaintiff, having a claim of dower in premises advertised to be sold by a receiver, attended the sale, and requested the defendant to purchase the property, stating that she had no claim thereon, on the faith of which the defendant became the purchaser, and the plaintiff subsequently took a lease of the premises, from him; *Held* that these circumstances worked a perfect and effectual *estoppel in pais*, against any claim or title of the plaintiff in hostility to that which the defendant acquired at such sale. LORR, J. dissented.

A PPEAL by the plaintiff from a judgment ordered at a special term, on a trial before the court, without a jury. The plaintiff, as the widow of Patrick Maloney, deceased,

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brought this action to recover her dower interest in certain real estate situate at Hunter's Point, Queens county.

The facts are briefly these: Patrick Maloney, being the owner of the premises described in the complaint, on the 11th of November, 1864, conveyed the premises to his brother, Michael Maloney, for the nominal consideration of \$1. The plaintiff, Eliza Maloney, joined in this conveyance and released her dower; and on the 28th of December, 1864, Michael Maloney conveyed the premises in fee to the plaintiff. Both of these conveyances were duly acknowledged and recorded in the office of the clerk of Queens county. In March, 1865, judgment was recovered against Patrick Maloney for \$1946.14. Subsequently, upon proceedings supplementary to execution, a receiver of the property, &c. of Patrick Maloney was appointed. On the 10th of April, 1865, the receiver brought an action in the Supreme Court against Patrick Maloney, *Eliza Maloney* and Michael Maloney, for the purpose of having the above mentioned conveyances set aside and declared fraudulent and void as to creditors of Patrick Maloney. All of the defendants appeared and answered the complaint. The issues so joined were tried, and judgment was, on the 17th of November, 1865, rendered, declaring that the conveyances were void, as having been made to hinder and defraud creditors; and directing the premises to be sold; and further ordering that any of the parties who should be in possession should deliver possession thereof to the purchaser. Under this order, the receiver sold the premises to John J. Conklin for \$6100, subject to a mortgage of \$750, and Conklin assigned his bid to the defendant Horan. On the morning of the sale, and prior to the property being offered for sale, the plaintiff called at Horan's place of business and asked him to attend and bid, informing him that she had no claim upon the property. Conklin, the purchaser, was present at this time. The plaintiff, Horan and Conklin attended the sale, and

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were present when the terms of sale were read, by which it was stated that the premises would be sold subject to the \$750 mortgage. The report of sale having been confirmed, the receiver, on the 31st of July, 1867, conveyed the premises to John Horan. The price paid was the full value of the premises at the time of sale.

The court found the above facts, substantially; and as a conclusion of law decided and determined that the plaintiff had no estate of dower in the premises described in the complaint, and that judgment should be rendered for the defendant dismissing the complaint, with costs.

Amasa A. Redfield, for the appellant. I. 1. It has been said that the right that a dowress has to her dower is not only a legal right, and so adjudged in law, but she has also a moral right, to be provided for, and have a maintenance and sustenance out of her husband's estate, to live upon. She is therefore *in the care of the law, and a favorite of the law*. And upon this moral law is the law of England founded as to the right of dower. (1 *Story's Eq. Jur.* § 629.) "Her estate is favored in the law, and proceedings having in view its enforcement or establishment should be encouraged rather than defeated." (*In re Sipperly*, 44 *Barb.* 370.) 2. It is the rule of the common law, and is incorporated in the statutes of this state, that nothing that the husband can do—no act, deed or conveyance of his, or judgment or decree confessed by or recovered against him, shall prejudice the wife's right to her dower. (*Denton v. Nanny*, 8 *Barb.* 618. 1 *R. S.* 742, § 16.)

II. 1. A release of dower can operate only *as a release*. It must accompany the conveyance of another, and ceases to operate with that. It cannot operate as the transfer of an independent estate. If the principal instrument (the deed or the mortgage, as the case may be) is canceled, or never takes effect, or ceases to operate, the release of dower falls with it. The right of dower revives. (*Hal-*

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stead v. Eldridge, 2 Halst. 392. *Douglas v. McCoy*, 5 Ohio Rep. 527. *Powell v. Morison, &c. Mfg. Co.*, 3 Mason, 347. *Hall v. Savage*, 4 id. 273. *Barker v. Parker*, 17 Mass. Rep. 564, and cases cited below.) 2. In this case the deed, in which and by which she released her dower, was by a competent tribunal declared void. It then instantly ceased to operate. The estate upon which the release was designed to operate was defeated; the grantee could claim nothing, and in the absence of fraud on her part, her right of dower was restored. In *Summers v. Babb*, (13 Ill. Rep. 483,) the creditors of the grantor avoided the conveyance of the husband and wife, and it was held that thereby the estate upon which the release of dower was designed to operate was defeated. Hence the widow should be restored to her right of dower. (See also *Blair v. Harrison*, 11 Ill. Rep. 384.) In *Stinson v. Summers*, (9 Mass. Rep. 143,) it was decided that where a wife releases her claim of dower by joining her husband in a conveyance, and the purchaser recovers damages of the husband for breach of covenant of title, the release of the dower then becomes void and does not bar her right of dower after her husband's death. The reason is that by defeating the estate upon which the release of dower was intended to operate, the purchaser can claim nothing by his deed.

III. The plaintiff further claims that she is *not* estopped from claiming her dower, by reason of her having joined in the fraudulent conveyance of her husband, because, 1. The defendant is a stranger to the release. He is a third party with notice. He can derive no advantage from it. As against him she is not estopped, for by the well known maxim, *estoppels must be mutual and reciprocal*. A release of dower is binding only as against the releasee and his privies. (*Littlefreed v. Crocker*, 30 Maine Rep. 192. *Harriman v. Gray*, 49 id. 537. *Pizley v. Bennett*, 11 Mass. Rep. 298. *Blain v. Harrison*, 11 Ill. Rep. 384. *Robinson v. Bates*, 3 Metc. 40. *Taylor v. Fowler*, 18 Ohio Rep. 567.

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Woodward v. Paige, 5 *id.* 70. *Ketzmiller v. Van Rensselaer*, 10 *id.* 63. *Summers v. Babb*, 13 *Ill. Rep.* 483. *Gore v. Cather*, 23 *id.* 634. *Harrison v. Eldridge*, 2 *Halstead*, 392. *Richard v. Talbird*, *Rice's Eq. So. C.* 128. *Pierson v. Williams*, 23 *Miss. Rep.* 64. *Randolph v. Doss*, 3 *How. Miss.* 205. *Gray v. McCune*, 23 *Pa. St.* 447, 451.) 2. Is the defendant a privy to this void deed, or to the plaintiff's release? He derives no title from the plaintiff nor from the fraudulent grantee. On the contrary, he holds in direct opposition to them. His title is predicated on the absolute nullity of that deed and release. He is not in any way a privy to it. (See *Ketzmiller v. Rensselaer*, 10 *Ohio St.* 63; *Taylor v. Fowler*, 18 *Ohio R.* 567; *Harrison v. Eldridge*, 2 *Halst.* 392; *Gore v. Cather*, 23 *Ill. R.* 634; *Robertson v. Bates*, 3 *Metc.* 40.) 3. But admit, if it is consistent with common reason to do so, that the defendant is in some way a privy to the fraudulent deed. Yet the widow is not estopped. This deed was adjudged void on the sole ground of an intent on the part of her husband to thereby hinder, delay and defraud his creditors. There is not a suspicion that the wife was a party to this fraud. *She could not have been* a party to it, for the sufficient reason that by her release she placed nothing beyond the reach of creditors, to which they were entitled, or could obtain by any process of law. *She* is not a fraudulent grantor. The case of *Winship v. Lamberton*, referred to in *Woodworth v. Paige*, (5 *Ohio St.* 70,) is in point. In that case lands had been conveyed without consideration, and in fraud of the creditors of the husband. Judgment having been afterwards recovered against the husband, and execution levied, the lands were sold and conveyed by the sheriff. The purchasers at the sheriff's sale brought ejectment against the fraudulent grantees, and recovered on the ground of the fraud in the conveyance. On a bill filed to quiet their title, the question of the right of dower of the widow of the fraudulent

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grantor arose, and it was held that she was entitled to it. (See also *Miller v. Wilson*, 15 *Ohio St. Rep.* 108, 117.)

IV. I am unable to find any case in this or any other state, which on a close examination will be found to conflict with the principles established as the law in the foregoing cases. 1. The head note of the case of *Manhattan Co. v. Evertson*, (6 *Paige*, 457,) states a contrary doctrine, and a doctrine, too, entirely contrary to that adjudged by the court in that case. That case was this: One Evertson, being in embarrassed circumstances, conveyed certain real estate to his son, his wife uniting in the deed. The son executed back a declaration of trust to sell the property, pay the incumbrances and then to pay one Enrot \$1500. After a foreclosure and sale of the premises on an application for a distribution of the surplus moneys, the widow of Evertson (he having in the meantime died) claimed her thirds out of the surplus. The vice-chancellor refused to allow her dower and the chancellor sustained his decision. But the facts of this case, and the ground upon which the decision was placed, are essentially different from those cited above and from the one at the bar. It is true, that no consideration was paid by the grantee in that case, but the conveyance was made upon certain trusts duly specified in writing, which were pronounced fair and honest by the vice-chancellor, and to the extent of which the deeds were sustained by both him and the chancellor. As against the grantors, therefore, and, to the extent of those trusts, as against subsequent incumbrances also, the grantee was lawfully invested with the legal title for a proper purpose. The only interest, if any, remaining in the husband, was a resulting trust, and this was a mere equity, of which (before the Revised Statutes) the widow was not endowable; it followed that she was not entitled to dower in the surplus arising from the sale of the lands. The difference between a case of this character and one where the conveyance was for the sole and only purpose of defeating

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creditors, and is without any consideration whatever, is clearly and distinctly marked. (*See 1 Scribner on Dower*, 617, § 9.) 2. The only other case is a case in the New York Superior Court, *Meyer v. Mohr*, (1 Rob. 333,) in which, on setting aside a conveyance made by husband and wife as being void as against creditors, the referee decreed that the husband and wife should join in a new conveyance to a receiver for the benefit of creditors. This part of the decree does not appear to have been argued, and the court affirmed that part of the report by a paragraph, evidently without much consideration. But it does not appear in the case, but that the wife was a party to the fraud. And also it may be that the decree was so made to quiet the title as against the fraudulent deed, which by the same decree was declared void. The widow might still claim her dower. 3. The principle contended for is at the foundation of the case of *Wiswall v. Hall*, (3 Paige, 313,) where it was held that the wife is not affected by the fraudulent acts of the husband in consummating his contracts of sale, although she unites with him in a conveyance of the lands. Thus in this case, a vendor of a lot of land secretly intended to sell only a part of a lot, but made the vendee to understand that he was buying the whole of it, and only a part of the lot was included in the deed, for which the vendee paid the vendor the entire consideration intended by him to be given for the whole lot. The court compelled the vendor to execute to the vendee a conveyance of the whole. But the wife not being privy to the fraud attempted to be practiced upon the purchaser, although she had joined in the deed, the court refused to compel her to join in the new conveyance.

V. Some intimation was made at the trial, that the facts found in paragraph *eight* of the findings, (viz. as to the plaintiff's statement to Horan, that she had no claim upon the property,) created an equitable estoppel against the plaintiff's claim for dower. 1. It is only necessary on this

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head to remark that there was no proof, and is no finding, that she intended to mislead. This is necessary. (*Lawrence v. Brown*, 5 *N. Y. Rep.* 394. *Chautauqua Co. Bank v. White*, 6 *id.* 236. *Jewett v. Miller*, 10 *id.* 402.) *Non constat*, but she requested Horan to purchase, because he was her friend and she could buy her homestead back from him on better terms than she could get from a stranger. And, indeed, the plaintiff swore on the trial that this was the object of her request. 2. The defendant was not misled. There was no proof, and is no finding that he placed any reliance upon her statements. What man of ordinary capacity, in buying a piece of real property, relies upon the statements of a woman as to the title? He knew that she was Maloney's widow. 3. He did not act upon her statements. Another man bought the property at the public sale. Only ten per cent was paid down. Afterwards Horan bought the bid, having in the mean time ample opportunity to search the title through a lawyer, as indeed he did, as testified to on the trial.

VI. If this plaintiff is turned out of court, and deprived of "that moral and legal right of dower," are "her proceedings, having in view its enforcement, encouraged?" Is she any longer "in the care of the law and the favorite of the law?" She is rather its victim; and the principles of law which she had supposed to be the sure protection for the weakness of her sex, are become the instruments of her impoverishment.

John J. Armstrong, for the respondent. I. The plaintiff, Eliza Maloney, having been a party to the conveyance to Michael Maloney, her right of dower to the premises in question was extinguished, although the conveyance was subsequently declared fraudulent and void as to creditors. As against herself and husband the deed would remain a bar. (*Den v. Johnson*, 3 *Harrison*, 87. *Manhattan Co. v. Evertson*, 6 *Paige*, 457. *Meyer v. Mohr*, 1 *Rob.* 333.) The

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plaintiff having joined with her husband, with the intent to defraud his creditors, and this object having been frustrated, the court will not now allow her to commit another fraud by a repudiation of her own deed. As was well said by the Superior Court, in *1st Robertson*, she having united in the fraudulent deed, "she thereby divested herself of her inchoate right of dower, and must abide the consequences." The following cases also sustain the principle upon which the decision of the court below is based: *Osborne v. Moss*, (7 John. 161;) *Jackson v. Garnsey*, (16 id. 189;) 1 *Story's Eq. Jur. Redf. N.* § 371.

II. The order of the court under which the premises were sold, having directed a sale of the premises (without reserving or excepting any right or interest of Mrs. Maloney) she (being a party to it,) is concluded by the decree, and is barred from claiming dower in the land, as against the purchaser under that decree. This decree is conclusive upon the parties to it, not only as to the matter actually determined, but as to every matter which the parties might have litigated and have had decided as incident to the subject matter of the litigation, or coming within the purview of the action, whether as matters of claim or defense. (*Harris v. Harris*, 36 Barb. 88. *Hayes v. Reese*, 34 id. 151. *Gardiner v. Mills*, 5 Gill. 94.) Especially should this be so when it appears that the receiver sold the premises without making any reservation of dower, and that the sale was duly confirmed. Mrs. Maloney, being a party to the action, is concluded by the order of confirmation, as well as the original decree.

III. The plaintiff, on the day of sale, requested Mr. Horan to attend and bid, averring that she had no right or interest in the property. She was present and heard the terms of sale read, in which it was stated that the premises would be sold subject to the mortgage to the trustees of Union College, and did not make a claim of any right or interest in the premises. Under these cir-

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cumstances, the premises were sold and a full price paid therefor. We think she is estopped from setting up her claim to dower. These questions of estoppel are not in general controlled by technical rules, but are usually determined upon principles of equity and good conscience; the rule being that when a party procures, or even acquiesces in the disposition of his property by another, *under color of title*, he shall be bound by such disposition. (*Smiley v. Wright*, 2 Ohio R. 506. *Ellis v. Diddy*, 1 Carter, 561. *Tilton v. Nelson*, 27 Barb. 595. *Wood v. Seely*, 32 N. Y. Rep. 105.) This estoppel attaches itself to the land, and can be asserted in behalf of the grantee of the immediate purchaser. (*Wood v. Seely*, 32 N. Y. Rep. *supra*, and cases there cited by Denio, J. at p. 116.) The whole conduct of the plaintiff shows not only that she was a party to the effort of her husband to defraud his creditors, but that she *now* seeks, after inducing Mr. Horan to pay a full price for the land, upon a belief that she had no interest in the property, to commit a fraud upon him by means of this action for dower. It is not until after the deed is delivered, and the full purchase money paid, that she presents her claim. Her claim for dower should be against the surplus money, and not against the land sold to the defendant Horan.

GILBERT, J. The legal effect of a wife's uniting with her husband in a conveyance of his lands, is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel. (*Green v. Putnam*, 1 Barb. 500. *Moore v. Mayor, &c.* 4 Seld. 110.)

When the deed of the husband has been avoided, at the suit of creditors, on the ground that it was made with intent to hinder, delay or defraud them, there remains an estate in the fraudulent grantee, which is sufficient to support or feed this estoppel; for the fraudulent deed is

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good and effectual as between the parties to it. A payment by the fraudulent grantee or grantor to the creditors, of their debts, would extinguish the same, and render his title valid. The relation of the creditors to the property is analogous to that of *cestuis que trust*, in a trust resulting under the statute of uses and trusts. (1 R. S. 728, § 52. *Garfield v. Hatmaker*, 15 N. Y. Rep. 483.) Whatever consequence may ensue from proceedings by the creditors *in invitum* for the enforcement of their remedy, upon the estate fraudulently conveyed, is attributable to the statute, which, in conjunction with the decree, acts directly upon such estate, and divests so much thereof only as may be necessary to obtain satisfaction of the claims of creditors; and the wife's dower in that part of the estate so divested will be as effectually barred as in the part which may remain vested in the fraudulent grantee. There cannot, in the nature of the case, be any severance. And so if the whole estate be taken away; because this results from the enforcement of the remedy, and not because the fraudulent deed conveyed nothing to the grantee. (See *Manhattan Co. v. Evertson*, 6 Paige, 457; *Meyer v. Mohr*, 1 Rob. 333; *Den v. Johnson*, 3 Harris, 87.) The contrary doctrine has been held in some of our sister states, but upon grounds which are not satisfactory to us. (*Robinson v. Bates*, 3 Metc. 40. *Woodworth v. Paige*, 5 Ohio R. 70. *Miller v. Wilson*, 15 id. 108. *Pierson v. Williams*, 23 Miss. R. 64.)

It appears that the plaintiff took a conveyance of the estate conveyed by her husband from the fraudulent grantee, and that this was done in furtherance of the original intent to defraud. Having participated knowingly and designedly in this fraud, the court will not help her to undo the consequences of her acts, one of which was to accept a merger of her dower, in the fee conveyed to her. As she cannot be endowed of her own lands, the taking of this conveyance destroyed the claim, if any, which

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existed before. And, as we have seen, the avoidance of such a conveyance, by creditors, still leaves the conveyance effectual as to all the estate conveyed, except that which shall be divested for the purpose of paying them; and if this takes the whole estate, it is not because the deed is absolutely void, but because the statute authorizes it, and it is necessary to enforce the decree.

We think also that the plaintiff's statement to the defendant at the sale, that she had no claim upon the property, and her request to him to purchase, on the faith of which he became the purchaser, and her taking a lease from the defendant after the purchase, work a perfect and effectual estoppel *in pais* against any claim or title in hostility to that which the defendant acquired at such sale. (*Dougrey v. Topping*, 4 Paige, 94. *Smiley v. Wright*, 2 Ohio R. 511. *Tilton v. Nelson*, 27 Barb. 595. *Wood v. Seely*, 32 N. Y. Rep. 105.)

We are, therefore, of opinion that the judgment should be affirmed, with costs.

J. F. BARNARD and TAPPEN, JJ. concurred.

LOTT, J. concurred, except as to an estoppel *in pais*.

Judgment affirmed.

[KINGS GENERAL TERM, December 19, 1868. *Lott, J. F. Barnard, Gilbert and Tappen*, Justices.]

CATHERINE COYLE, adm'x, &c. *vs.* THE CITY OF BROOKLYN.

Where, in an action to recover a balance due on a contract made between the plaintiff's intestate and the defendant, there was but one question of fact between the parties determined by the jury, viz. whether the defendant had paid the amount agreed to be paid, and the defendant's claim that it had been paid, was supported by proof tending to show that one L. who had received the money, was a partner in the contract with the plaintiff's intestate, and also by evidence that the plaintiff had in fact authorized the defendant to pay L.; and the jury, upon conflicting evidence, found for the plaintiff; *Held*, that it must be considered as finally settled that the plaintiff's intestate, alone, was the contractor, and that the plaintiff did not give the defendant any authority to pay to, or L. any authority to receive, for her, the payment for the work.

And it being conceded that L. did superintend the work, having been employed by the deceased contractor, and continuing to superintend the same under the plaintiff as administratrix of the latter; *Held* that the plaintiff, by claiming under the contract, was not in law bound to ratify, and did not thereby ratify the acts of L. and with them the unauthorized receipt of the money from the defendant, in the absence of any proof of knowledge by her of the receipt of the money by him.

Held, also, that the case did not come within the rule that a principal cannot be permitted to enjoy the fruits of a bargain without adopting the instrumentalities of the agent in consummating it.

That the contract having been made by the principal, performance of it entitled the plaintiff, as his personal representative, to payment, and payment not having been made, to her or her agent duly authorized, her right of action was made out. And that an unauthorized payment to L. could not be ratified by her bringing an action on the contract, as she claimed nothing by reason of such payment, but on the contrary repudiated it, entirely. GILBERT, J. dissented.

THIS action was brought to recover money due on a contract entered into between Patrick Coyle, deceased, and the city of Brooklyn, for the paving of Grand street with Belgian pavement. The contract bears date the 14th day of April, 1865. The work was commenced in the month of March previous, and was completed about the 16th day of September, 1865. Coyle died on the 30th day of May, 1865, and the plaintiff is his administratrix.

The gross amount of the contract was \$31,777.50, and on the 28th day of June, 1865, there was paid to the plain-

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tiff in this action, on account, the sum of \$7070. On the 1st day of August, 1865, there was paid to William B. Lewis \$9450; and on the 16th September, 1865, there was paid also to Lewis the sum of \$15,257.50, being the balance due on the contract. The plaintiff admitted the payment of the \$7070, but denied the other payments. The defense was substantially that Lewis, to whom the subsequent payments were made, was the authorized agent of the plaintiff; while the plaintiff, on the contrary, insisted that Lewis was only the foreman in charge of the work. The defendant also claimed, on the trial, that Lewis was a partner of Coyle, and that, as surviving partner, he was entitled to collect the moneys.

The cause was tried on the 29th day of November, 1867, before Justice Lott and a jury, and resulted in a verdict in favor of the plaintiff for the full amount claimed—\$24,707.50, with interest.

A motion was made for a new trial on the minutes, and motion denied. The defendant appealed from the order denying the motion for a new trial, and also from the judgment entered herein.

Alexander McCue, for the appellant. I. The verdict of the jury was clearly against the weight of evidence. The comptroller and Lewis both swear positively to the directions given by the plaintiff in the office of the comptroller to make all future payments to Lewis.

II. The comptroller and Lewis both swear positively as to the relation in which the latter stood in the contract—as a partner with Coyle. And this position is corroborated by all the facts in the case. 1. All the work done and materials furnished, were done and furnished at the expense of Mr. Lewis. This amount must have exceeded \$10,000 to have entitled the contractor to have received the first payment of seventy per cent—his \$7070. 2. Immediately upon the receipt of this first payment, the plaintiff placed

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to the individual credit of Mr. Lewis the sum of \$6000. 3. The plaintiff visited the work from time to time as the work progressed. Mr. Lewis swears he told her of the subsequent payments made to him by the comptroller, as they were made. The plaintiff denies this; but the fact remains undisputed that she was a business woman, accustomed, as she says, to this contract system, and she should be presumed to have notice of the fact that the contractor was entitled to payments from time to time as the work progressed. She neither advances, nor offers to advance, any money for the prosecution of the work, and although she knows that the work is done, makes no inquiry of the comptroller as to the moneys due on the contract, till after January, 1866, and this too at a time when her necessities obliged her to borrow \$500 from this very comptroller, who ought to have had in his hands a large amount of her money, if she was the real principal in the contract; and to crown all, she makes and files an inventory of her husband's estate, in which she states under oath that the interest of her husband in the contract was one half, and correctly appraised at \$300.

III. Whether Lewis was a partner or not, or whether express authority was or was not given to the comptroller to pay, and to Lewis to receive the moneys; the facts above alluded to, show that Mr. Lewis was her agent and attorney; in fact, her foreman, having full and unlimited control of that work, paying the laborers and purchasing all materials. The moneys which he received were applied, as Lewis swears, without contradiction, to the payment of the bills for material and labor done, furnished on this work. Beyond any doubt, the plaintiff, assuming her to be solely interested in the contract, would have been liable for work done or materials furnished on the order of Mr. Lewis. In receiving and disbursing this money, therefore, Lewis was acting strictly within the line of authority, and the defendants are entitled to protection. And whether

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he was or not, all the work for which the plaintiff claims having been performed by him, the plaintiff cannot accept his acts in doing the work as having been done as her agent, and yet disaffirm his acts in drawing the money which it was necessary that he should have in order to prosecute the work. "A principal cannot accept the action of an agent so far as it is beneficial to himself and reject the residue." (*Farmers' L. and T. Co. v. Walworth* 1 N. Y. Rep. 433, 447. See also *Story on Agency*, §§ 250, 253; *Bell v. Shibley*, 33 Barb. 610; *Dexter v. Adams*, 1 How. App. Cas. 771, 793; *Cobb v. Dows*, 10 N. Y. Rep. 335; *Hearne v. Keene*, 5 Bosw. 579; *Ferguson v. Hamilton*, 35 Barb. 427; *Crans v. Hunter*, 28 N. Y. Rep. 389; *Elwell v. Chamberlin*, 31 id. 611.)

IV. The story of the defendant is entirely improbable in itself. The inventory sworn to by her; the surrender of the entire work to the charge and management of Lewis, in connection with other facts to which attention has been called, are utterly inconsistent with the pretense that Mr. Lewis was a mere "foreman of the job."

V. The relations of Faron and Lewis with the plaintiff were such that no reasonable person could justly impute to them, or either of them, a desire to wrong her in the matter in question. Comptroller Faron was liable to the city if he paid the moneys to Lewis without proper authority, and there is no pretense of doubt as to his responsibility. Lewis had no object in drawing these moneys unless he believed he was authorized so to do; still less would he have spent these moneys in the performance of this contract if his object had been to defraud the plaintiff; it would have been much easier, and certainly more natural, had such been his object, to have pocketed the money and abandoned the work. Besides, their relations were of such a character as to preclude the idea of a combination on the part of Faron and Lewis to injure the plaintiff. The one acted as her arbitrator in some diffi-

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culty with her son; the other loaned her money; both were her friends.

VI. There is, therefore, no sufficient motive shown which should discredit either Faron or Lewis, while the conduct of the plaintiff, and her talk about the giving of \$500 to the deputy street commissioner for a certificate on the work, all of which is flatly denied, shows that her pretensions to being a competent business woman, are tolerably well founded, while she has motive enough to be dishonest. We submit that her testimony is unworthy of credit. The jury have clearly acted under some improper view of the testimony in the case, and their verdict should be set aside.

VII. The court erred in permitting the plaintiff to contradict the witness Faron.

VIII. The exceptions to the charge of the court are well taken.

IX. The motion for a new trial should not have been denied. "A new trial should always be granted where the weight of evidence is in favor of the applicant, and it appears that justice has not been done." (*Gra. & Wat. on New Trials*, vol. 1, p. 368. *Sheldon v. Hudson River R. R.* 29 Barb. 226. *Conrad v. Williams*, 6 Hill, 444. *Hart v. Hosack*, 1 Caines, 25. *Jackson v. Sternbergh*, Id. 162. *Mumford v. Smith*, Id. 520. *Boyd v. Colt*, 20 How. Pr. 384. *Dolsen v. Arnold*, 10 id. 528. *Vance v. Phillips*, 6 Hill, 433. *Wright v. Orient Ins. Co.*, 6 Bosw. 269. *Robbins v. Hudson River R. R. Co.*, 7 id. 1. *Lansing v. Stone*, 37 Barb. 15.)

X. Appeals from the decisions of the judge who tried the cause at circuit, on motions for new trial made upon his minutes, have been considered, in this district, ever since the adoption of the Code. The Code provides for a speedy hearing of a motion for a new trial to be made before the judge who presided at the trial, to be made upon his minutes at the same term. (§ 264.) The same

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section expressly provides for an appeal from the decision, and states that "a case or exceptions" must be had. See also the succeeding section, which also refers to both kinds of motions at circuit, (upon the minutes,) and at special term upon a case made. (§ 265.) The section of the Code relating to appeals from judgments on trials before a court, without a jury, also refers to the reviewing of a trial by jury upon the facts. (See § 268.)

XI. The subsequent chapters of the Code directing the manner, &c. in which appeals shall be taken, are to be considered in relation to the preceding provisions as to motions and decisions. It is, therefore, evident that sections 264, 265 and 349 are to be considered the one with reference to the other. Section 349 provides that "an appeal may, in like manner, and within the same time, be taken from an order made at a special term by a single judge of the same court or county, or by a special county judge," &c. From the preceding provisions of the Code it is evident that this sentence should be read as if punctuated with a comma after the words "special term," otherwise no effect is given to the words "by a single judge," and what is intended for an efficient provision is made mere surplusage. It is only because of the want of that comma in the printed copies of the Code that the plaintiff can contend that the provisions of the Code at sections No. 264 and 265 are of no account, and that the right of appeal from motions for new trial upon the judge's minutes is not given. The sections above cited have always been considered in this district as giving the right of appeal. (*Algro v. Duncan*, 24 How. Pr. 210. *Morange v. Morris*, 20 id. 257. *Watson v. Scriven*, 7 id. 9. *Moore v. Wood*, 19 id. 409. *Till. & Shear. Prac. vol. 2, p. 561.*) The decision in the case of *Parker v. Jervis*, (34 How. Pr. 254,) is contrary to the established practice in all the districts of the state. It is opposed to all the reported cases upon the subject, and while, if followed, it would com-

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pletely overthrow all established practice, precedent and authority, upon one of the most familiar subjects known to the bench and bar, it treats the matter as if the opinion given was only following the established practice.

XII. Upon both the matters of law and the questions of fact urged herein, the judgment should be reversed, and a new trial ordered.

Crooke, Bergen & Pratt, for the respondent. I. The only question in this case was, whether the payments made by the defendant to Wm. B. Lewis, amounting to \$24,707.50, were properly made; and that question depended entirely, under the charge of the court, upon a question of fact; and that question of fact was presented and submitted by the presiding judge to the jury in three ways, and we will consider them separately. *First*. Was William B. Lewis a partner with Patrick Coyle, in his life time, in the contract? (a.) To constitute a partnership there must be a communion of, and participation in, *profits and loss*. This is well settled. (*Pattison v. Blanchard*, 1 *Seld.* 186. *Post v. Kimberly*, 9 *John.* 470. *Conklin v. Barton*, 43 *Barb.* 435. *Mumford v. Nicoll*, 20 *John.* 171. *Turner v. Bissell*, 14 *Pick.* 192, 195. *Story on Partnership*, 69. *Rice v. Austin*, 17 *Mass. Rep.* 197, 206. *Loomis v. Marshall*, 12 *Conn. Rep.* 69.) (b.) The evidence in this case does not establish a partnership. There is no evidence that Lewis was to participate in any loss. The evidence of Faron that Coyle told him, two or three months before his death, that Lewis was going in with him as a partner, proves nothing, because there is no evidence that that intention (if it ever existed) was ever carried out. (c.) Lewis does not swear that he was a partner, but according to his testimony, the arrangement between him and Coyle was as follows: "The arrangement was, that I was to furnish the money, being allowed interest for all the money I furnished on the contract, and one half of the profits." (d.) And his testi-

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mony altogether, is entirely consistent with Mrs. Coyle's, that Lewis was a foreman on the work, and was to have a share of the profits as compensation for his services. (e.) Again, if he was a partner, or claimed to be, why did he apply to Mrs. Coyle for money on the 28th of June, when he swears he was to furnish all the money. Again, why did he sign the receipts on the contract as agent or attorney of Mrs. Coyle, as administratrix. If he was a partner he was entitled to receive the money from the city as surviving partner. (f.) If Lewis was a partner, and Faron knew it, as he swears he did, why did Faron require, and why did Lewis give receipts in the name of Mrs. Coyle, the administratrix. If that story be true, Mrs. Coyle had no right to the money, and the receipts taken from her by Faron were no protection to the city, because in that case, Faron, in paying to Mrs. Coyle, with knowledge that she was not entitled to the money, would be making a willful misapplication of the funds of the city, and such payment would be no protection to the city in an action by the surviving partner. (g.) The fact is evident from the testimony in this case, that this idea of a partnership was an afterthought, and it does not dovetail in with the facts of this case.

II. The question as to whether there was a partnership was a question of fact for the jury, under the evidence and instructions of the court, and we submit that it was submitted by the judge in as favorable a way for the defendant as it could have been; and we insist that if the learned judge erred at all on that subject, it was in making a charge more favorable to the defendant than it was entitled to upon the evidence.

III. The charge of the judge as to what is necessary to constitute a partnership, is elementary law.

IV. The jury having found the fact that there was no partnership, their finding is conclusive. (*Parker v. Jervis*, 34 *How. Pr.* 256.)

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V. *The second question is*: Did Mrs. Coyle, the plaintiff, authorize the payment of the money or the delivery of the bonds in question to William B. Lewis? (a.) Upon this question the testimony of Lewis and Faron on the one side, and of the plaintiff, Catharine Coyle, on the other, is squarely in conflict. (b.) The testimony of Lewis and Faron is not supported by a single fact in the case, and stands alone. (c.) The testimony of Mrs. Coyle is corroborated by many material facts in the case, among which are the following: 1st. By the statements of Lewis and Faron that Lewis was a partner of Mr. Coyle; because, if that was true, Faron not only did not require any authority from Mrs. Coyle, but it would have been an idle ceremony for her to give it; because, upon their theory of a partnership, Lewis, as surviving partner, was the only person entitled to receive the money or bonds, and the only person who could receive and receipt for them, and, therefore, their two theories are utterly inconsistent, and makes their whole testimony unreliable. 2d. She is confirmed and strengthened by the fact that the version given by Lewis of the alleged interview between the three, when the alleged authority was given, is certainly contrary to the version given by Faron, and in direct conflict with it, one swearing positively that Mrs. Coyle was present when the receipt on the contract was signed, and the other swearing that she was not.

VI. The question as to whether the authority was given, was a pure question of fact, upon the evidence. And the testimony of the witnesses is in direct conflict; and the court will perceive that the testimony of Mrs. Coyle is supported and confirmed by many important facts in the case, while, on the other hand, that of Faron and Lewis is in conflict between themselves, and the testimony of neither one is supported by any fact in the case; and we claim that the finding of the jury upon that fact, under the

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charge of the judge in this case, is conclusive. (*Heritage, adm. &c. v. Hall*, 33 Barb. 347. *Hosen v. Hammond*, 39 id. 96.)

The third question is: Did the plaintiff expressly prohibit the city from paying the money or bonds to Lewis? 1st. The jury have found as a fact that the defendant was expressly prohibited from paying the bonds or money to Lewis, or to any one except the plaintiff herself, and if Lewis was the general agent of the plaintiff to do this particular work, yet when the defendant was prohibited from paying over the bonds or money to any one but the plaintiff, it was a restriction on his authority of which the defendant had notice and could not violate. The finding of the jury that the defendant was prohibited, is sustained by the evidence. (a.) The plaintiff did not intend that Lewis should use the installments falling due on the contract to finish the work, and that is evident for the following reasons: 1st. Lewis had agreed to furnish all the money, and was to have interest on his advances. He was at work under a special contract, by the terms of which he was to have interest on the money he advanced, and one half the profits, as compensation for his services. 2d. Mrs. Coyle did not hold him out to the defendant as her agent, nor adopt his acts by bringing this suit. On the contrary, she expressly prohibited the defendant from paying to him and by bringing this action she expressly repudiates the payment to Lewis, by the defendant and the receipt of the money by him. (a.) It is like the case of A building a house for B, under a special contract, whereby he was to do all work and furnish all materials. A borrows money and obtains materials on credit of a person who had notice of the terms of the contract. When the house is finished, B, by entering into possession, does not make himself liable for the indebtedness of A. (b.) Any claim by Lewis that he was acting for Mrs. Coyle in receiving the money could not bind her, because the defendant, before making

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the payment, had been expressly notified by the plaintiff not to pay to any one but herself. 3d. Even without this express prohibition she did not accredit him as her agent to receive the money, and it was in no manner contemplated by the relations between them that he should receive it. 1st. By his (Lewis) own evidence it appears that he was to furnish all the money from his own funds to finish the work. 2d. Mrs. Coyle was required by Lewis to go to the comptroller's office to get the first installment. Up to this time no one claims that he had any such authority. It was at this interview with the comptroller that she expressly prohibited him from paying to any one other than herself, and the jury have found that no authority was given by her, either at that interview or afterward, and that finding is supported by the evidence of Mrs. Coyle, and it is also supported by the contradiction between Lewis and Faron as to what did take place. 3d. The plaintiff has never received any benefit from these unauthorized payments. She only obtained what she was entitled to under the contract between Lewis and Patrick Coyle; not even that, for she advanced six thousand dollars to Lewis, which was not called for by said contract. 4th. This case is not within the principle that a principal cannot adopt part of the acts of an agent and repudiate part. The plaintiff does not adopt any of Lewis' acts in connection with receiving this money. Suppose I authorize A to purchase a horse of a man who knows exactly the extent of his agency, and he does purchase a horse, and at the same time sells my farm. Do I by taking the horse adopt his act in selling my farm to a stranger? In order to be within the principle, the act of the agent must be a part of the business about which he is employed. Collecting debts for Mrs. Coyle as administratrix was no part of the work of a foreman in charge of a gang of workmen; especially where he undertakes to collect of a party who has been notified not to pay him. 4th. The plaintiff did repudiate the acts of

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Lewis in the only way possible. 1st. She did not know they were paid over until January 8, 1866, and the work was then finished. She could not tear up the work. She could only demand the bonds and bring suit. 2d. Lewis did not finish this contract; he only worked there as any other hand. The materials had been purchased by Coyle before his death and the men hired and set to work. Lewis was only to see that they kept at work and did the work properly. It was done by Mrs. Coyle, and the estate is liable. 3d. The jury found as facts: 1. That Lewis was not a partner. 2. That he was not authorized by Mrs. Coyle to receive the money from the city. 3. That she had instructed the defendant not to pay the money or bonds to any one but herself, or on her written order. And these findings of fact are supported by the evidence.

VII. The order denying motion for new trial, on the minutes of the judge, is not appealable. 1. There are but three grounds upon which a motion can be made on the minutes, viz. "Upon exceptions, or for insufficient evidence, or for excessive damages." (*Code*, § 264.) And the context of this section shows that the motion must be made at the circuit. 2. It will not be claimed—that the motion in this case was made upon the grounds of "exceptions," or "for excessive damages." The only other ground, then, is "for insufficient evidence"—and that, then, was the ground of the motion in this case. 3. Now we say that there is no provision of law, giving an appeal from an order made by the judge, denying a motion for a new trial on his minutes, on this ground. 4. "Where the trial is by jury, the motion for a new trial upon the law and the fact, must be made and decided in the first instance at special term; and the Code in such case only authorizes an appeal upon the law, to be taken directly to the general term from a judgment." (*Magee v. Osborn*, 32 *N. Y. Rep.* 678.) 5. The provisions of the Code regulating motions for new trials, in trials by jury, will be found

contained in sections 264, 265. These sections do not authorize any appeal. 6. The provisions regulating appeals to the general term of the Supreme Court from circuit and special term, &c. are contained in chapter 4, of title 11, of the Code, and that chapter is entitled, "Appeals to the Supreme Court and the Superior Court and Court of Common Pleas of the city of New York from a single judge to the general term;" and section 348, contained in that chapter, is entitled, "Appeal from circuit and special term to same court in general term," &c. &c. That section is as follows: "In the Supreme Court, the Superior Court of the city of New York, and the Court of Common Pleas for the city and county of New York, an appeal upon the law may be taken to the general term from a judgment entered upon the report of referees, or the direction of a single judge of the same court, in all cases; and upon the fact when the trial is by the court or referees." But no appeal is given upon the fact when the trial is by jury. In the Supreme Court the appeal must be heard in the same manner as if it were an appeal from an inferior court. 7. The above are the only provisions of law regulating motions for new trials in cases tried by jury and appeals from circuit to general term. The 349th section of the Code does not apply to trials by jury at all. It is restricted to, and only applies to orders made at special term. The order appealed from in this case was made at circuit on the minutes, and not at special term, and section 349 of the Code has no application to it. We claim, then, 1st. That the order denying motion on the minutes, on the ground that the verdict is against the evidence, is a discretionary order and not appealable. (*Thurber v. Townsend*, 22 *N. Y. Rep.* 517.) 2d. That there is no provision of law allowing an appeal upon the facts in a case of a trial by jury. (See *Parker v. Jervis*, 34 *How. Pr.* 256.) 3d. That in no event can an appeal be had upon the facts, in case of trial by jury, until after a motion made at special term on

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a case made, and then the appeal taken from the order of the special term, under section 340. (*Lobach v. Hotchkiss*, 17 Abb. 88. *Anderson v. Dickie*, Id. 84. Rule 33, *Supreme Court*.) 4th. That there is no appeal given from an order denying motion for a new trial on judge's minutes. 5th. The court will perceive that the appeal given by section 348, from circuit and special term to general term, upon the facts, is restricted to cases where the trial is by the court or referees. (*Parker v. Jervis*, 34 How. Pr. 256.) 6th. Section 323. Writs of error in civil actions, as they have heretofore existed, are abolished, and the only mode of reviewing a judgment or order in a civil action shall be prescribed by this title. (Title 11.) 7th. The order denying motion for new trial upon the minutes, was a mere formal order, entered of course without argument, and it was not suggested that it was made on any such ground, that the verdict was contrary to the evidence, and was supposed and treated as made on the questions of law raised by exceptions. 8th. It is unfair for the general term to review a jury trial on the facts when the question is for the first time started at the argument, at general term. 9th. We insist, that if the motion on the minutes is made on the ground that the verdict is "against evidence," the party making the motion should so state it at the circuit, and that unless he does, the motion will be presumed to have been made upon the exception taken, and he should not be allowed to spring the question upon us on the argument at general term. In *Morange v. Morris*, (20 How. Pr. 257,) Judge HOGEBROOM, in his opinion, (at page 263,) states the law as follows: "But where the case is sought to be reviewed both upon questions of law and questions of fact upon a settled case, containing the evidence and the exceptions, such case must be first heard at the special term, before a single judge and before judgment, because there is no provision of the Code allowing a review of the facts in the first instance by the general term." The court will

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perceive, by an examination of the reported cases that in every instance where the question of the power of the Supreme Court to grant new trials upon the ground that the verdict is against evidence is discussed, they are cases where the cause was tried either before the court or referees under section 348; or cases where a motion for a new trial was made upon a case made and settled at a special term and argued upon that question there, and came up on an appeal from that order under section 349; or cases where no motion for a new trial was not made at all. And we have been unable, after a careful examination, to find a single authority holding that an appeal, such as was taken in this case, brings up any thing more than the exceptions taken at the trial. In *Morrison v. New York and New Haven R. R. Co.*, (32 Barb. 568,) Judge ALLEN says: "To present a question of fact upon the evidence, or the right of the unsuccessful party to a new trial for the reason that the verdict is against evidence, or upon the ground of surprise, or newly discovered evidence, or the like, a motion must be made at special term, and from the order made upon such motion an appeal may be taken to the general term." (*Code*, § 349.)

For the reasons above given, we claim that in this case the court can only examine the questions of law presented upon this appeal.

By the Court, J. F. BARNARD, J. There was but one question of fact between the parties, which has been determined by the jury. It was not disputed but that the contract of the city of Brooklyn with the plaintiff's deceased husband had been executed. The defendant claimed to have paid the price of performance. This claim was supported by proof tending to show that William B. Lewis, who had received the money due upon the contract, was a partner therein with the plaintiff's intestate, and also by evidence that the plaintiff had in fact authorized the defendant to

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pay Lewis. The evidence of the parties was in strict contradiction upon this issue, and the jury have found for the plaintiff. It must therefore be considered by this court as finally settled, that Patrick Coyle alone was the contractor, and that the plaintiff did not give the city any authority to pay to, or William B. Lewis any authority to receive for her the payment for the work. It is conceded that Lewis did superintend the work; he was employed by the deceased contractor and continued to superintend the same under the plaintiff as his administratrix. The plaintiff brings her action upon the contract thus performed under the direction of Lewis. This presents the only remaining question, whether the plaintiff, by claiming under the contract, is not in law bound to ratify, and does not thereby ratify the acts of Lewis, and with them the unauthorized receipt of the money from the defendant. There are two classes of cases under which a principal is bound by the unauthorized acts of an agent; one where the principal, after knowledge of the unauthorized act of the agent, ratifies and consents to it, or where, after like knowledge, the principal fails to give notice of dissent within a reasonable time. In this case there is no proof of knowledge by the plaintiff of the unauthorized receipt of the money from the defendant by Lewis. The principle established by the other class of cases is, that a principal cannot be permitted to enjoy the fruits of a bargain without adopting the instrumentalities of the agent in consummating it. There is no case in which this doctrine is maintained where the cause of action was not created by the unauthorized act of the agent; either a chose in action was purchased, or a claim was canceled without authority by an agent for his principal and a new security substituted. If a principal sue upon a security bought without authority, or sue upon a substituted security given for one canceled without authority, he by reason thereof ratifies the act of the agent by which the securities were

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obtained. In this case the contract was made by the principal; its performance entitles the plaintiff to payment. It must be paid to her or her agent duly authorized. It has not been done; her right of action is made out. An unauthorized payment to Lewis cannot be ratified by her action upon this contract; she claims nothing by reason of such payment; she repudiates it entirely.

The judgment should be affirmed, with costs.

GILBERT, J. (dissenting.) On the 14th day of April, 1865, Patrick Coyle, deceased, entered into a contract with the defendant, for the paving of Grand street with Belgian pavement, for a certain price per running foot, which was to be paid in installments, from time to time as the work progressed, not exceeding seventy per cent of the contract price for the work actually done. On the 30th of May, 1865, and before any work had been done under the contract, Mr. Coyle died. The contract was actually performed by William B. Lewis, or under his supervision and direction. On the 20th of June, 1865, sufficient work had been done by Lewis to earn an installment of \$7070, and on that day the defendant made a payment to the plaintiff upon the contract, of that amount. The plaintiff deposited \$6000 of this sum in the Nassau Bank to the credit of Lewis, to pay for material and labor on the work. The subsequent installments due upon the contract, amounting in the aggregate to \$24,707.50, were from time to time paid by the comptroller of the city directly to Mr. Lewis, and he testified that he applied the same in the execution of the contract. The plaintiff furnished no evidence contradictory of this: on the contrary the evidence shows that the plaintiff never did an act towards performing the contract, or expended a dollar upon the work, except as aforesaid. Both Lewis and the comptroller also testify that Mrs. Coyle expressly authorized these payments to be made, and that she was informed

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of the making of them immediately after they were made. The plaintiff, however, denies that she gave any such authority, or that she had such knowledge. Evidence was given tending to show that Lewis was, in point of fact, a partner with Patrick Coyle, deceased, in the contract; and evidence was given on the part of the plaintiff to disprove such partnership. The last payment, which included all that was due upon the contract, was made September 16, 1865. The plaintiff made no application for any payment until January following, and was then, as she testifies, informed for the first time of the aforesaid payments having been made to Lewis. She then repudiated the authority to receive said moneys altogether, and without offering to allow any sum which had been actually expended in executing the contract, brought this action, as administratrix of her deceased husband, Patrick Coyle, to recover the aforesaid balance of \$24,707.50. The jury rendered a verdict in her favor for that amount. The defendant then moved for a new trial upon the minutes, which was denied. Judgment having been entered, the defendants appealed from that and also from the order refusing a new trial.

I shall not discuss the legal propositions contained in the judge's charge, for I am of opinion that the motion for a new trial should have been granted, because there is not any evidence to sustain the verdict. The only disputed question of fact arose upon a theory of the transaction presented by the defendant, which was utterly opposed to that of the plaintiff. I put aside, then, all evidence on the part of the defendant, and take the facts testified to by the plaintiff as undisputed. According to her testimony Lewis was her agent to perform the work required to be done, in order to entitle her to the payments under the contract. She gave Lewis no express authority or instructions. As she states the case, he had no authority, except such as the law implies from the nature of the employment, and the general course of the business committed to

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him. The rule of law upon this subject is, that whatever acts are usually done by agents of that kind, are deemed to be incidents of the authority confided to them in their particular business, employment or character. In other words, the mode in which the business, in which the agent is employed, is usually done, furnishes the rule by which his authority is measured. (*Story on Ag.* 60-106. *Jeffrey v. Bigelow*, 13 *Wend.* 520. *Sandford v. Handy*, 23 *id.* 266. *Nelson v. Cowing*, 6 *Hill*, 366. *Capel v. Thornton*, 3 *C. & P.* 352. *Edmonds v. Bushell*, 1 *Law Rep. Q. B.* 97.) In this case the inference is irresistible, that the plaintiff intended that Lewis should use the installments, provided by the contract, in performing the work. She provided no means herself. She did not request him to make any advances. In fact she neither said or did any thing, except to recognize him as foreman, who was to receive an indefinite share of the profits for his services. How did she expect he was to accomplish the work? Did she suppose he would make advances, or buy materials on credit, or borrow money to pay laborers? If he had authority to do either of these things, it was not conferred expressly upon him, but arose solely by implication from the nature of his employment, and the usual course of that kind of business. The same implication would suffice to authorize him to receive the payments which were made under the contract. I will say in this connection that the statement of Lewis, that he was to furnish one half the money and have one half the profits, does not help the plaintiff's case, for two reasons; first, because this was part of an alleged partnership agreement which the plaintiff denies and repudiates, and second, because the money to be thus furnished, was only what was necessary before a reimbursement by payments under the contract. And such an arrangement necessarily involves a right on the part of Lewis to receive such payments from the city.

Such being the nature of the agency of Lewis, whether

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in fact he had authority to receive the payments or not, he did receive them, as the plaintiff testifies and as the jury have found, while assuming to act for her in a business in which she had accredited him as her agent. According to Lewis' testimony, which is not contradicted, he appropriated these payments in execution of the contract.

Upon a well established principle of law, the plaintiff is precluded from maintaining an action to recover the fruits of this assumed agency, while at the same time she repudiates the acts of the agent, whereby those fruits were secured. If Lewis was not her agent to perform the contract, then it has not been performed by her, or on her behalf. If he was her agent for that purpose, he was authorized to employ means appropriate to that end. No means could be more appropriate than the advances which by the contract it was provided the defendant should make. (*Cases supra.*) The principle stated has been applied in numerous instances, and in a great variety of ways, to prevent fraud and injustice, and is indispensable for that purpose. Holt, Ch. J. thus declares it in *Bolton v. Hillersden*, (1 *Ld. Ray.* 224.) If a master has never entrusted a servant to charge him by signing notes in the master's name, yet if the money, for which such note is signed, comes to the use of the master, or if, in the present case, the servant gave the note to raise money to pay the foreign bills charged to his master, which is for the benefit of his master, such note will bind the master, though he never permitted the servant to sign such notes before." The rule is thus stated by Mr. Hovenden: "Though an agent act gratuitously in exceeding his authority, subsequent approbation adopts his acts; and this approbation *will be inferred*, whenever the principal avails himself of any advantage derived from his acts, for he will not be permitted to avow his agent's negotiations as to part, and disavow as to the residue." (*Hov. on Fraud*, 144.) In *Fitzsimmons v. Joslyn*, (21 *Vermont Rep.* 139,) Redfield, Ch. J. lays down

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the rule, that the principal must in every view be implicated to the fullest extent in what his agent did within the scope of what he *expected him to do*, or within that which *he knew he had done*, if he still *persists in taking the benefit* the agent's act." See also to the same effect *Story's Agency*, § 250; *Paley on Agency*, *Dunlap's ed.* 172. The decisions of our own courts from an unbroken chain of authority to the same effect, form an early period to the present time. A few of them are cited. (*Codwise v. Hacker*, 1 *Caines*, 539. *Shiras v. Morris*, 8 *Cowen*, 60. *Olmstead v. Hotailing*, 1 *Hill*, 317. *Moss v. Rossie Co.*, 5 *id.* 137. *Dexter v. Adams*, 2 *Denio*, 651. *Benedict v. Smith*, 10 *Paige*, 127. *Farmers' L. and T. Co. v. Walworth*, 1 *N. Y. Rep.* 447. *Bennett v. Judson*, 21 *id.* 238. *Elwell v. Chamberlin*, 31 *id.* 611. *Bell v. Day*, 32 *id.* 165.) Indeed the principle is elementary in the law of agency, and as Ch. J. Redfield observed in the case of *Fitzsimmons v. Joslyn*, (*supra*), is "almost innate in the breasts of all men not wholly insensible to all just moral relations." I think it governs this case.

It follows, therefore, that the plaintiff, by thus asserting the agency of Lewis, and by seeking to avail herself of the benefit of Lewis' acts, in performing the contract, necessarily affirms his acts, in obtaining the means whereby it was performed.

The judge at the circuit did not consider the real question involved, and, through mistake or inadvertence, a result has been obtained, which must shock every man's sense of justice.

In such a case, on an appeal from an order refusing a new trial, this court can unquestionably correct the error, and it is its duty so to do by setting aside the verdict, and granting a new trial, notwithstanding the point was not raised in the court below. Such a course was taken in *Catterall v. Hindle*, (2 *Law Rep. C. P.* 368,) and approved by this court in *Bunnell v. Greathead*, (49 *Barb.* 106.) See also *Code*, §§ 173, 174.) To doubt the authority of the

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court to do so, is to challenge its power to administer justice. A verdict, which on undisputed facts is against law, cannot be allowed to stand. (*Rich v. Penfield*, 1 *Wend.* 380. *Lawrence v. Barker*, 5 *id.* 301. *Highland Bank v. Wynkoop, Hill & Den. Supp.* 243. *Sheldon v. Hudson River R. R. Co.* 14 *N. Y. Rep.* 218. *Keyes v. Devlin*, 3 *E. D. Smith*, 523. *Macy v. Wheeler*, 30 *N. Y. Rep.* 235. *Parker v. Jervis*, 34 *How. Pr.* 256.) This relief is also specifically provided for by the Code. Section 264 provides that the judge who tries the cause may entertain a motion, to be made on his minutes, to set aside a verdict, and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages. It also provides that when an appeal is taken from his decision, a case or exceptions must be settled. Section 349 authorizes an appeal from an order made at a special term, or by a single judge when it grants or refuses a new trial. It is not a proper construction of this section, to limit its operation to such order, when made at special term only. Every order, when made at special term, is directed by a single judge, for only one judge can sit thereat. But a single judge can make an order granting or refusing a new trial, when not sitting at special term or circuit, as in the case before us. The language of section 264 is, "the judge who tries the cause," not the court before which it is tried, may entertain the motion, and the section contains no requirement, that it shall be heard at special term. Moreover, the several subdivisions of section 349, embrace a great variety of orders, which are never made at special term, but are always made by a single judge in vacation. Section 349, therefore, was evidently intended to embrace both kinds of orders.

The general provision of section 329, authorizing this court, upon an appeal from a judgment, to review any intermediate order, also embraces the order in this case. (*Pumpelly v. Owego*, 13 *Abb.* 387. *Lane v. Bailey*, 1 *Abb. N. S.* 407.) Something was said on the argument about

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a notice to the comptroller not to pay Lewis, but no such question was submitted to the jury. Indeed, it would be idle to attempt to give any such effect to the testimony of the plaintiff. Her direct evidence does not prove an intention to give any notice, or in any way to restrict Lewis' powers, but is a mere expression of her unwillingness to sell. Upon her cross-examination she omits altogether what she had before said, on the subject of the payments being made to her. And all that she said is perfectly consistent with the idea that she thought then, as she claimed upon the trial, that Lewis was her agent, with such authority as the law gives him.

The judgment and order denying a new trial should be reversed, and a new trial should be granted, costs to abide the event.

Judgment affirmed.

[KINGS GENERAL TERM, December 19, 1868. *Lott, J. F. Barnard, Gilbert and Tappan*, Justices.]

JOHN J. SNYDER vs. PETER NEEFUS, impleaded, &c.

By the statute of frauds, an agreement for the sale of lands, to be valid, must be binding upon all the parties by whom the sale is to be made.

The word "party," in the statute, means all the vendors, when more than one are included in the contract of sale.

Where an agreement for the sale of land owned by two persons as tenants in common is subscribed by a third person as their agent, it must appear that he was duly authorized by both the vendors to sign the contract. If authorized by one only, the agreement is not binding upon either of the parties thereto. J. F. BARNARD, J. dissented.

To be binding, the contract must be signed by the vendors, all of them, personally or by an authorized agent, and the contract as it appears on its face, must be assented to by the vendee.

A vendee will not be deemed to have assented to a contract for the sale of land, which is binding on one of two vendors, only. And the contract being, for that reason, not binding upon him, at the time it was signed, he cannot make it a valid agreement as to one vendor only, by assenting to it as such a contract, afterwards.

Snyder v. Neefus.

THIS action was brought against Peter Neefus and Sarah Neefus, for the specific performance of the following agreement:

“Peter Neefus and Sarah Neefus sell unto John J. Snyder the piece of land in Flatbush on East Broadway, adjoining land sold to Mr. Randolph, containing fifty feet front and rear, and in depth to land of Mr. Schoonmaker, for the price of \$1325. Ten dollars cash paid down, and balance on delivery of the deed conveying the same in fee with good title, free of incumbrances, and with full covenants of warranty.

November 12, 1866.

PETER NEEFUS,

(Witness Philip S. Crooke.)

SARAH NEEFUS.

By P. S. Bergen, *Agent*.”

The answer of the defendant Peter Neefus was substantially a denial of the authority of the agent who subscribed the agreement, to bind the defendant. The defendant Sarah Neefus, by her answer, admitted that Peter Neefus was, at the date of the contract, seised in fee of the premises, and that P. S. Bergen was the uncle of the defendants; and denied all the other allegations of the complaint.

The action was tried before a justice of this court, without a jury, who found the following facts:

1st. That on the 12th day of November, 1866, the defendant Peter Neefus was seised in fee simple of the premises in question, situated in the town of Flatbush, Kings county, on East Broadway.

2d. That on the 12th day of November, 1866, the plaintiff, John J. Snyder, made and executed an agreement in writing with the defendant Peter Neefus, by Peter S. Bergen as his agent, for the purchase of said premises at the price or sum of thirteen hundred and twenty-five dollars, which agreement is set forth in the complaint in this action in full.

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3d. That the said Peter S. Bergen was duly and fully authorized and empowered to sign said agreement for said Peter Neefus, and to sell said property, and was his agent for that purpose.

That said Bergen had no authority to sign said contract for Sarah Neefus.

4th. That on the 13th day of November, 1866, the plaintiff duly demanded from said defendant Peter Neefus a conveyance of said property according to said agreement, and offered to pay him the sum of thirteen hundred and twenty-five dollars thereupon, according to the terms of said agreement.

5th. That the defendant Peter Neefus refused to make such conveyance, and stated that he would not convey said property to the plaintiff.

6th. That said Sarah Neefus has, and at the time of the commencement of this action, and at the date of said contract had, no right, title or interest in said premises.

Upon the foregoing facts the judge found and decided as conclusions of law:

1st. That the plaintiff, John J. Snyder, was entitled to judgment against the defendant Peter Neefus, that he, said Peter Neefus, specifically perform said agreement and convey said property to the plaintiff, upon being paid the said sum of thirteen hundred and twenty-five dollars, as provided in said agreement, less the sum of ten dollars paid on the signing of said agreement, and the costs of this action to be taxed, which are to be deducted therefrom.

2d. That the complaint in this action be dismissed as to the defendant Sarah Neefus, with the costs.

3d. That the defendant Peter Neefus pay the costs of this action as adjudged, and he ordered judgment accordingly.

The defendant Peter Neefus excepted to the findings of the judge, and appealed from the judgment.

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D. P. Barnard, for the appellant.

Crooke, Bergen & Pratt, for the respondent.

GILBERT, J. The written memorandum put in evidence purports to be a joint contract of Peter Neefus and Sarah Neefus. It was subscribed by Bergen as the agent of both vendors. The court below found as a fact that Bergen had no authority from Sarah Neefus to sign the contract. We are of opinion that by the statute of frauds an agreement for the sale of lands to be valid, must be binding upon all the parties by whom the sale is to be made. This statute makes void every contract for the sale of any lands, unless the contract shall be subscribed by the party by whom such sale is to be made, or by the agent of such party lawfully authorized. (2 R. S. 135, §§ 8, 9.) The word "party," in this statute, means all the vendors, when more than one are included in the contract of sale. For by the act concerning the Revised Statutes, passed December 10, 1828, (2 R. S. 778, § 11,) it is provided that "whenever in the Revised Statutes, or in any other statute, any subject, matter, party or person is described or referred to by words importing the singular number, or the masculine gender, several matters or persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included; and these rules of construction shall apply in all cases, unless it be otherwise specially provided, or unless there be something in the subject or the context repugnant to such construction." In *McWhorter v. McMahan*, (10 Paige, 393,) the chancellor asserted the same construction of the statute of frauds. He said, "here the sale was to be made by both the complainants; and it was necessary, therefore, that the agreement should be signed by both of them, either in person or by an agent, duly authorized, in order to make it a valid contract of sale under this provision of the Revised Statutes."

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The subject of the contract of sale in that case, was land belonging to the firm of Baldwin & McWhorter, who were copartners. The bill was filed by these copartners to compel a specific performance of the contract by the vendee, and it was sustained upon the ground that McWhorter, the non-signing partner, was present when the contract was made, and had ratified it. In this case the mutuality of obligation, which is essential to the validity of a contract is wanting, because one of the several parties, whom it purports to bind, is not bound. It is necessary that all the parties to an agreement should assent to it, to make it binding upon either. The plaintiff did not assent to a contract binding on one vendor only. For this reason the contract was not binding upon him at the time it was signed, and he cannot make it a valid agreement as to one vendor only, by assenting to it as such a contract, afterwards. (*Davis v. Shields*, 26 Wend. 350.) The fact that Sarah Neefus was not bound would have been a good defense against any liability on his part, for it is not sufficient to charge a vendee upon such a contract, that the agreement is duly signed by him or by his agent. (*Townsend v. Hubbard*, 4 Hill, 351. *Champlin v. Parish*, 11 Paige, 410.) To be binding the contract must be signed by the vendors, all of them, personally or by an authorized agent, and the contract as it appears on its face must be assented to by the vendee. (*Reynolds v. Dunkirk, &c. R. R. Co.*, 17 Barb. 614.)

The fact that Sarah Neefus had conveyed her interest to Peter Neefus has no bearing upon the case. The question is whether the statute has been complied with. She may still have an interest as *cestui que trust*, or otherwise, and the plaintiff proved such a claim on her part. But whether she has or not, the contract which by its terms is a joint one, of both Peter and Sarah, cannot be turned into the separate one of Peter, without violating the maxim, that written contracts cannot be contradicted by parol evi-

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dence. For if a party may be stricken out of a contract by parol evidence, why not alter it in respect to the quantity or price, or situation of the land, by changing the vendee, or in any other particular. Such a construction would not only allow a contradiction of the written instrument, but would defeat the statute. (*See Van Alstine v. Whipple*, 5 Cowen, 164. *Wright v. Weeks*, 25 N. Y. Rep. 153.)

We might have grave doubts of the sufficiency of the evidence to warrant the finding of the court, that Bergen was authorized by Peter Neefus, the latter having testified that he never gave such authority, and the plaintiff having omitted to call Bergen, the alleged agent, to prove his agency; thereby creating a presumption more or less strong against the existence of such agency. But it is not necessary to consider that question. Upon the ground before discussed, the judgment should be reversed and a new trial granted, with costs to abide the event.

LOTT, J. I concur. It is a settled rule, that if part of an entire contract be void under the statute of frauds, the whole is void. (*See Van Alstine v. Whipple*, 5 Cowen, 162, particularly p. 164, cited within.) I think, too, that the principle asserted by Chancellor Walworth in *McWhorter v. McMahan*, (10 Paige, 393,) establishes that this agreement cannot be enforced. Miss Neefus, it is found, never executed or authorized the execution of the agreement.

TAPPEN, J. also concurred.

J. F. BARNARD, J. dissented.

New trial granted.

[KING'S GENERAL TERM, December 19, 1868. *Lott, J. F. Barnard, Gilbert and Tappen*, Justices.]

ROBERTS, survivor, &c. *vs.* FISHER and others.

An agreement by a creditor to take the note of a third person in payment of his debt, with the actual transfer of the same, and a written acknowledgment that it is so taken without recourse, on account of the creditor's claim, furnish sufficient grounds for the jury to find that the note was taken at the risk of the creditor. If so, the receipt of the note is a payment of the claim, and an extinguishment of the right of action thereon.

A PPEAL by the plaintiff from a judgment entered upon the verdict of a jury. The action was brought by the plaintiff as survivor of the firm of Roberts & Cathell, to recover a balance due from the defendants upon a sale of merchandise. The defense set up in the answer was that the merchandise was sold upon a special agreement that the same should be paid for, to the full amount thereof, by promissory notes of third parties. That they have paid for said merchandise in promissory notes, except \$140.70, which they paid in cash.

The jury found a verdict in favor of the defendants, and the plaintiff appealed.

The facts are stated in the opinion.

N. B. Hoxie, for the appellant.

W. E. Curtis, for the respondents.

By the Court, J. F. BARNARD, P. J. The plaintiffs sold goods to the defendants, to be paid for in business paper, the notes of third parties, which should be pronounced satisfactory by the plaintiffs. Under this arrangement, about the 7th of April, 1861, the defendants proposed a note made by Homer Rice & Co. for \$377.75, for the plaintiffs' acceptance. On the 2d of April, 1861, the note was declared satisfactory by the plaintiffs. The defendants promised to send the note by mail, or bring it to New York at their next visit. On the 17th of April, 1861, the note was transferred by the defendants to the plaintiffs by

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indorsement, and a receipt taken therefor without recourse, on account. On the 16th of April, 1861, Homer Rice & Co. stopped payment, which fact was not known to either party. The jury found for the defendants.

The evidence of the agreement to take the note in payment, with the actual transfer of the same, and the written acknowledgment that it was so taken without recourse, on account of the plaintiff's claim, furnish sufficient grounds for the jury to find that the note was taken at the risk of the plaintiffs. If so, the receipt of the note was a payment of the claim, and an extinguishment of the plaintiff's right of action. (3 *E. D. Smith*, 66.)

The judgment should therefore be affirmed, with costs.

[NEW YORK GENERAL TERM, November 2, 1868. *J. F. Barnard, Charles and Ingraham*, Justices.]

THE PEOPLE, *ex rel.* Failing, *vs.* THE COMMISSIONERS OF HIGHWAYS of the town of Palatine, Montgomery county.

Where the object and subject of an act of the legislature was to authorize and direct the commissioners of highways of a specified town to reduce a road then of the width of four rods, and for the distance of one mile, to the width of three rods; and the title of the act was, "An act to regulate a road in the town of Palatine, Montgomery county;" *Held* that the *subject* of the act was not *expressed in its title*, as required by section 16, of article 3, of the state constitution, and that the act was an attempted fraud upon the public rights, and was null and void.

After land taken for a road has been paid for by the public, it cannot be taken from the public and donated to the former owner, without any consideration paid therefor, by an act of the legislature purporting to reduce the width of the highway.

When town authorities have taken the land of an individual for the purposes of a public highway, and have paid the proprietor therefor, the right to the easement becomes a vested right in the public; and the public having received the land, and the proprietor the compensation, it becomes a fixed contract between them, and the provision of the constitution of the United States,

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declaring "that no state shall pass any law impairing the obligation of contracts" applies.

The right of eminent domain, in the state, does not authorize the taking of property belonging to the public as a highway, and donating it to an individual.

A PPEAL by the defendants from an order made at a special term, directing a peremptory mandamus, to the commissioners of highways of the town of Palatine, in the county of Montgomery, commanding them, forthwith, to reduce a certain highway in said town, from the width of four rods, to the width of three rods, under the provisions of an act of the legislature, passed May 7, 1868, chapter 687, entitled "An act to regulate a road in the town of Palatine, Montgomery county." The first section of this act directs the said commissioners to alter and reduce to the width of three rods, the following described highway in said town, to wit: "Beginning at the house of Jacob Cook, now occupied by said Cook as a residence, and running thereon westerly, past the dwelling house of John A. Failing, to the intersection of the highway, leading from Palatine bridge to the residence of Reuben Walrath."

The commissioners of highways refused to act as demanded by the relator. Upon which, the relator moved for a peremptory mandamus, which was granted, on motion, by an order; from which order the said commissioners appealed to the general term. The other facts necessary to be stated, appear in the opinion

J. H. Failing, for the relator.

J. Genter, for the commissioners.

By the Court, POTTER, J. If the order made in this case can be legally reversed, a high sense of common justice demands its reversal. Legislative abuses, in disregard of private property, have become the standing reproach of

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the day. Important encroachments upon public and individual rights, in blind disguise, and with bold impunity of consequence, are smuggled through the legislature, by acts bearing most deceitful or mysterious titles, and so ingeniously devised as to ward off all suspicion or inquiry, or entirely to mislead parties interested, as to the object of the act, if perchance they should ever read its title. Such considerations as these, in relation to this existing evil, so frequently brought, as they are, to the knowledge of the courts, imperiously call upon us when the occasion presents itself, to look with a proper and jealous scrutiny, that the constitution, in subordination to which all statutes are subject, shall not be encroached upon; nor its provisions contravened by legislative action. The framers of the constitution, it seems, were fully impressed with the existence of such abuses, and determined to guard against them. The 16th section of the 3d article of the constitution declares that "in all local and private bills, the subject of the bill shall be expressed in its title." The object and subject of the bill in question, is to authorize and direct the commissioners of highways, of the town of Palatine, in the county of Montgomery, to reduce an important and much traveled road now of the width of four rods and for the distance of one mile, to the width of three rods. The title of the act by which this reduction in width is to be accomplished is, "*An act to regulate a road in the town of Palatine, Montgomery county.*" We are not informed what number of roads of this, or of greater or less length there may be in said town; so that the title would apply to, perhaps, twenty or more roads, just as well as to this; and we may well suppose that each road district and its inhabitants whose road was supposed to need no "*regulating,*" would be entirely unconcerned at reading the title to such an act; but it is easy to suppose that the title of an act which had truly expressed its object, entitled "An act to reduce the width of the road in the town of Palatine,

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beginning at the house of Jacob Cook, and running thereon westerly past the dwelling house of John Adam Failing for the distance of one mile," would have encountered severe opposition, and probably defeat. The *body* of the bill expresses its object; the *title* of the bill disguises and conceals it. No person, from reading its title, would ever guess at its object. In this respect, the act is a fraud upon the public; it is a fraud upon the constitution. The words employed in the title, "*to regulate,*" are not only inappropriate, but deceptive. The words in the enactment are, "*to alter and reduce the width,*" expressing an entirely different idea. The *title* gives not the locality, distance, or object to be accomplished. The fraud is too transparent to be tolerated; it is too miserably bungling in every feature to succeed. The act is *local*. The subject is not fairly or honestly expressed in the title; but carefully avoided. That the act was conceived in fraud, and its title designed to defraud; its extraordinary provisions; and the attempted action under it, is practical, and confirmatory evidence.

Let us look, for one moment, at the merits of this question; at the condition and circumstances of this public easement before and since the passage of this act. This is a public highway, much traveled; leading to Palatine bridge over the Mohawk river in one direction, and to Stone Arabia churches, and through the town of Ephratah in Fulton county, in the other; that such was the extent of travel on this road, that in the year 1848, it was widened to four rods by the public authorities of the town, and duly recorded in the town book; that at the time of such widening, there was paid to the said *relator* and the other proprietors, for such widening, the sum of \$340; that all of said sum, except \$75, was for the land now owned by the relator; all of which land is within the distance now intended to be made narrower under the provisions of this act. The effect of which would be, if this act is carried

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out, to give the *relator* a strip of land one rod in width, and of the length of nearly one mile, which land has been paid for at public expense; a large portion of which payment of money, is now in the relator's pocket. This act proposes to take from the *public*, without *consideration* to them, this easement and right in real estate, and donate it to the relator. A more shameful and unblushing attempt at moral larceny, on a small scale, was never attempted; and a more disgraceful design of obtaining money by false pretenses, and by legislative legerdemain and chicanery, does not pollute the statute book; and it now remains with the court to say whether such infamy can be so perpetrated under this kind of legislation. This legislative act is imperiously mandatory to the defendants; without requiring the ordinary decencies of that common and reasonable inquiry by the accustomed authorities, whether this land so to be surrendered up, was any longer needed for public use. The act seems to forbid the exercise of any official judgment, discretion, or duty of this character. It demands, without a reason or a wherefore, that this public vested interest shall be transferred to a private individual, without any compensation whatever, to be given the *public* from whom it is to be taken. It is not necessary to enter into an argument, to prove that when the town authorities took the land in question for the public purposes of a road and had paid for it according to law to the original proprietors, the right to this easement became a vested right in the public; that when the public had thus received the lands, and the proprietors had received the compensation, it became a fixed contract between them. It is only necessary then to say that the constitution of the United States, article 1, section 10, declares, "that no state shall pass any law impairing the obligation of contracts."

Under a government controlled by written constitutions, legislatures are not the supreme power. Whenever they

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step beyond the limits inhibited by constitutional authority, they have transcended their power, and their acts are utterly void. Legislation is not, therefore, omnipotent.

There is another ground upon which this act is void. In the case of *Varick v. Smith*, (5 Paige, 137,) Chancellor Walworth said, "that the right of eminent domain in the state, does not imply a right in the sovereign power of the state to take the property of one and transfer it to another, when the public interest could be in no way promoted by such a transfer, even if a *full* compensation was fully awarded to the owner thereof." How much more forcibly is this doctrine true, when it is attempted to be taken from the public and *donated* to an individual. In the matter of *Albany Street*, (11 Wend. 151,) where commissioners had been appointed to take property for *public* use, had taken a whole lot, when only a *part* of it was required for the street, under an act which enacted, "that when a part of a lot was taken for public use, the commissioners, if they deemed it expedient, might include the whole lot in the assessment." Chief Justice Savage said: "If this act is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, it was the assumption of a power the legislature did not possess." And this was a case where some compensation was to be paid for the property taken. But to take the property of one, though it be the *public*, and donate it to an individual, is not only a violation of natural right, but of the spirit of the constitution. The great mass of moral, sober, thinking people, are raising the voice of indignation against legislative corruption, and legislative interference with *private* and *vested* rights, and of the snares and devices by legislative attempts to overreach the quiet, industrious but less informed portion of community. Unless this portion of the people can look to the *courts* for protection against these encroachments, there is nothing left to secure them the constitutional pro-

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tection of *life, liberty and private property*. It appears to me, that this case presents the opportunity for judicial rebuke to legislative abuses of this character. I am clearly of the opinion that the act in question is an attempted fraud upon public rights; a gross attempt through the the forms of legislation, to obtain property by false pretenses; a fraud upon the requirements of the constitution as to the title of the act; and, in its provisions, is in direct contravention of the constitution of the United States.

I think that the order of the special term should be reversed with costs, and with costs to the defendants on the motion at special term.

[SCHENECTADY GENERAL TERM, January 5, 1869. *James, Rosekrans, Potter and Becker*, Justices.]

FERRIN vs. MYRICK, administrator, &c.

An executor or administrator, in this state, as a trustee of the estate, may create a charge upon it for expenses attending his administration, which he is authorized to incur in the proper discharge of his trust.

Thus he may render the estate liable by contracting for suitable head stones to be placed at the grave of the deceased, where there are sufficient assets properly applicable to that purpose.

An executor or administrator by ordering such articles, as a part of the funeral expenses, makes himself personally liable for them; but if he pays for them himself, the estate is liable over to him for the amount.

APPEAL by the plaintiff from an order sustaining a demurrer to the complaint. The complaint alleges the appointment, in March, 1865, of Jacob Hartman as administrator of the estate of Sanford Hartman, deceased, his removal in December, 1866, and the appointment of Myrick in his place; that in May, 1865, said Jacob, as such administrator, contracted with the plaintiff to manufacture and deliver a set of grave stones, for the price of \$140, to be ready by September following. Said grave stones being

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purchased to be placed at the grave of said deceased, and being suitable to his rank and station in life, and to the circumstances of his estate, and being reasonable. That the plaintiff thereupon performed his part of the agreement, but said Jacob and the defendant have refused to receive or pay for the stones, except that Jacob, as administrator, paid \$40 of the price in February, 1866. That the defendant has sufficient assets applicable to the payment of this claim.

The defendant demurred to the complaint because it did not state facts sufficient to constitute a cause of action. The following grounds of demurrer were alleged:

"1. The said complaint does not show that the defendant was appointed administrator of the estate of Sanford Hartman, deceased, by any competent court having jurisdiction.

2. The complaint does not show that the grave stones mentioned therein were suitable to the rank and condition of Sanford Hartman, deceased, or the circumstances of his estate.

2. There is no privity of contract between the plaintiff and defendant to pay for the said grave stones."

M. H. Merwin, for the appellant. I Suitable funeral expenses, (including monument,) are in law, a charge upon the estate, and the acts of an administrator in relation thereto, within the scope of his duty and authority, bind the estate. Such charge, as it in law exists, or as it may be fixed or determined by the authorized acts of the administrator, can be enforced, the same as any other liability, against the estate. (*Hapgood v. Houghton*, 10 *Pick.* 154. *Matter of Thompson*, 41 *Barb.* 237. *Chouteau v. Suydam*, 21 *N. Y. Rep.* 179. *Howard v. Powers*, 6 *Ohio R.* 92, in *n.* 3 *M. & W.* 356. *Parker v. Lewis*, 2 *Devereaux*, 21, in *n.* 3 *Y. & J.* 38. *Rogers v. Price*, *Ex.* 3 *Y. & J.* 28. *Chapple v. Cooper*, 13 *M. & W.* 252.) 1. It is well settled, and was

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conceded in the court below, that it is the duty of an administrator to bury his intestate, to pay the funeral expenses including the expenses of a grave stone suitable to the condition in life, and circumstances of the deceased; that the estate is chargeable therewith, and that they are to be paid in preference to all other charges thereon. The burial of the deceased is the first duty of an executor or administrator. It may be performed by an executor before probate. (*Toll.* 24.) Ordering a funeral and appropriating a reasonable sum to that purpose, does not make a party an executor *de son tort*. (4 *M. & W.* 378. 3 *Y. & J.* 38, *n. a.*, and *authorities cited*.) The administrator, on his final settlement, is not only permitted, but required, to produce vouchers for all funeral charges. (3 *R. S.* 5th ed. 179, § 60. *Dayton*, 313.) "Funeral expenses," says Lord Coke, (3 *Inst.* 202,) "are to be allowed of the goods of the deceased before any other debt or duty whatsoever." Such expenses are a *quasi* lien. 2. The administrator, Jacob Hartman, when he made the contract with the plaintiff, was acting strictly within his duty as administrator, and made it as such. He simply carried out, to the extent of making definite and certain, a liability or duty imposed by law. He did not assume to charge himself personally; neither did the plaintiff so charge him. The credit was given to the estate. It was within the province of the administrator to determine, in the first instance, what was suitable and reasonable, and that being done, the liability of the estate was fixed. Just as an estate is bound on an account stated by an administrator, (*Holmes v. D'Camp*, 1 *John.* 34,) or as it is within the power of an administrator to promise so as to save the statute of limitation. (*Whitaker v. Whitaker*, executor, 6 *John.* 112.) *Chouteau v. Suydam*, administrator, (21 *N. Y. Rep.* 179,) was an action for an accounting, based on a written contract of compromise made by a deceased executor prior to the appointment of the defendant, and the point was raised that the

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executor was only personally bound. Held that the contract was intended to be, and was in his representative capacity, within the scope of his authority, and his successor and the estate was bound. (*See pp.* 182, 183.) 3. But it is said to have been decided that an action will not lie, for funeral expenses, against the administrators, as such; in other words, that the estate, though bound, cannot be reached. As to the English cases, *Tugwell v. Heyman, executor*, (3 *Camp.* 298,) and *Rogers v. Price, ex.* (3 *Y. & J.* 28, *decided in* 1829,) are the earliest English cases referred to on this subject. They were both actions for funeral expenses, and against executors as such, and in both the defendants were held liable, there being assets. In *Corner v. Shew, ex.* (3 *M. & W.* 350,) decided in January, 1838, these cases were discussed, and while they were not overruled, but the counsel for the defendant admitted, (*p.* 351,) they might stand consistent with his position, still the court said, that those cases only decided that the law implies a contract on the part of the executor personally, and not in his representative capacity, to pay funeral expenses. The declaration contained four counts, first, for goods sold to the defendant, as executor, at his request; second, for work in like form; third, for money paid for the use of the defendant; and, fourth, on account stated. The court admitted the third count to be good, but were of opinion that the first two counts were necessarily for debts due from the defendant, in his own right, and hence, a misjoinder. Whether any of the counts were for funeral expenses don't appear, and the liability of an estate for such, was not discussed. In *Green v. Salmon*, (35 *E. C. L.* 404,) decided in Queen's Bench, in June, 1838, it was held that in an action by an undertaker for funeral expenses, against a person not an executor, a residuary legatee is a competent witness for the plaintiff. For, although a person, other than an executor, may have rendered himself liable to the undertaker, the estate is ultimately answer-

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able for so much of the cost as an executor might reasonably pay and no more ; and the witness, therefore, has no disqualifying interest ; and Lord Denman, in giving judgment, says : " The question was whether he was not interested to relieve the residue by charging the defendant ? we think not ; for the estate must, at all events, pay the reasonable expenses of the funeral, and can, in no event, be liable beyond them," and the case of *Rogers v. Price*, is recognized on the argument, and the common law liability of executors referred to, and any doctrine that an estate is discharged when somebody else is personally liable, is expressly repudiated. In *Brice v. Wilson*, (28 *E. C. L.* 407 ; 3 *N. & M.* 512,) decided in King's Bench in 1834, the common law liability of an executor, as such, to pay reasonable funeral expenses, is distinctly recognized, and the counsel on both sides recognize *Rogers v. Price*, as authority. In *Ashby v. Ashby, ex'r* (14 *E. C. L.* 77 ; 7 *B. & C.* 444,) decided in King's Bench in 1827, the declaration had three counts : 1st, for money paid for the use of the defendants, as executors, at their request ; 2d, for money had and received ; 3d, on account stated, demurrer for misjoinder. Held that the 1st and 3d counts could be joined, and judgment *de bonis testatoris* ; but the second count was for a personal charge, not within the scope of the duty of an executor. Says Bayley, J. in discussing the first count : " There may be cases in which the creditor may be entitled, at his option, either to sue the party in his personal or representative character, and when, as in this case, he makes his election to charge the defendants in the latter character, if the right stated in such count would be a right binding the assets of the testator, it would be very reasonable to say they might be joined. * * I think the plaintiff, having paid the money to the use of the defendants, as executors, has the same right that, before such payment, belonged to the person to whom it was made, and, consequently, that he, the plaintiff, may charge the

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assets of the testator. * * A plaintiff, in many instances, may have an advantage in proceeding against the assets, rather than against the executor personally. The executor, in his individual capacity, may be insolvent; in his character as executor, he may have assets adequate to answer any claim, and when the money has been paid to his use, as executor, justice requires that the person who has made that payment should have the privilege of looking to the fund which the executor has in that character," *Chapple v. Cooper*, (13 M. & W. 252,) decided in Exchequer, 1844, was an action against an infant widow on her promise to pay the funeral expenses of her deceased husband. Held that funeral expenses are regarded in the law as a necessary for the deceased. Says Alderson, B.: "There are many authorities which lay it down that decent Christian burial is a part of man's own rights, and we think it no great extension of the rule to say, that it may be classed as a personal advantage and reasonably necessary to him." If this be so, there is an implied promise by the deceased, while living, to pay for those services, when properly rendered to him after his death. (See note, 3 Y. & J. 38.) I find no later case than the above, and I submit upon this showing that the case of *Rogers v. Price*, is still good law in England, that there an estate is liable for funeral expenses, and a proper action will lie therefor against an administrator, as such. 4. Two cases in this state are said to be in point: *Myer v. Cole*, (12 John. 349,) and *Demott v. Field*, (7 Cowen, 58.) The question in both these cases was whether there was a misjoinder of counts for the reason that the defendant was personally liable on some, and as executor on others, therefore, different judgments would be required. The court decided that one of the counts in each case (being for goods, &c.) was so framed as to charge the defendant personally. That the court meant to decide no more than this in the latter case, is shown by the re-

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mark made in the opinion, that the defendant would be liable on the promise charged upon him, whether he had assets or not; and, in the other case, it is said that the defendant would be personally liable; for the promise is not alleged to have been made by them as executors, citing, among others, *Carter v. Phelps*, (8 John. 440,) where it is said, on page 441: "A count on a promise made by an executor or administrator, *as such*, and in which he is not charged as personally liable, may be joined with a count on a promise made by the intestate. The rule has become settled," citing several cases. The cases in 3d and 24th Wend. had no reference to a claim like the present, and only decided that claims against a defendant personally, could not be joined with those against him as administrator. In *Benjamin v. Taylor*, (12 Barb. 331,) the reason for the misjoinder is stated to be that in the one case the executor is liable only so far as he has assets, and in the other is liable personally, whether he has assets or not. According to this rule, inasmuch as want of assets would be a good plea to an action for funeral expenses, when a personal promise is not relied on, such an action would lie against an executor, as such. In none of these cases was the question before the court, whether an administrator, as such, by a proper form of action, could not be held. Such an action, when a personal promise was not counted or relied on, would not lie against the administrator personally, because: (1.) The liability depends on whether the administrator has assets. The want of them is a good plea, which would not be the case in a simply personal action. An administrator is liable, because he might debit the estate with those expenses, and he can only take from the estate that for which he is liable as administrator. The foundation of the liability is the law, and not the promise of the administrator. (2.) The judgment in such an action would be *de bonis testatoris*. This was distinctly held in *Hapgood v. Houghton*, (10 Pick. 154,) decided in 1830, in the

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Supreme Court of Massachusetts, on the question of misjoinder, and the court say, (*p.* 156,) that the estate is just as liable for funeral expenses, as for necessary supplies in the lifetime. So in *Howard, adm'r v. Powers*, (6 *Ohio Rep.* 92,) it was held that an administrator may be sued, as such, in all cases where the assets of his intestate are, directly or indirectly, sought to be charged. The same was held in *Parker v. Lewis*, (2 *Devereux*, 21,) and the court say: "They form a charge upon the assets, independent of any promise by the executor or administrator, upon the ascertainment of the fact, that they are of that description and proper for the estate and degree of the deceased. The case of *Thompson*, (41 *Barb.* 237,) is strongly in point. A. G. Thompson died in 1851. Sheldon became executor. Cowles performed professional services, as attorney, for Sheldon, as executor, for the benefit of estate in 1857, 1858, 1859. Sheldon died in 1859, and E. G. Thompson was appointed administrator in 1860. Cowles sued him as administrator, in the Supreme Court, recovered judgment in 1862, and applied to the surrogate of New York for an order for the administrator to pay. The order was granted and the administrator appealed. The point was made that it was not a debt of the deceased, not against the estate, but against Sheldon personally, and the surrogate had no authority, under the statute, to order payment; in other words, not a claim against the estate. The order of the surrogate was affirmed, and the court, (Leonard, J.) say: "It cannot be admitted that an administrator can hold a fund in his hands to which he is lawfully entitled to resort for the payment of the just and necessary expenses of administration, and refuse, at his pleasure, so to apply the fund as to set the creditor at defiance. It may be conceded that the administrator, who employs the services of counsel in the necessary defense or collection of his trust, is personally liable for the payment thereof; but the estate is also liable, and it is not the privilege of the

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administrator to decide whether he shall be made liable in his personal or representative capacity. That election is to be made by the creditor, if the right of election exists, and not by the debtor, and the administrator is entitled to have the amount refunded." (See also *Dudley v. Griswold*, 2 *Bradf.* 24.) A like principle is followed when it is held that whenever money received will be assets, the executor may sue for it, and declare in his representative capacity. (28 *Barb.* 473. 1 *Wms. ex'rs*, 789. 26 *E. C. L.* 34. 25 *id.* 33.) The cases concede an action will lie for money paid at the request of the executor for use of the estate. (21 *N. Y. Rep.* 183.) The plaintiff has here furnished his property for the use of the estate, at the request of the executor. What difference is there in principle? If the position of the defendant is correct, there is no legal proceeding by which an undertaker can possibly reach the assets. If the administrator will not pay, he can only sue him and recover a personal judgment, which, if the administrator is insolvent, he cannot collect. He cannot reach the bail of the administrator, for he has no claim against him as such. If he goes into the surrogate's court, he has no standing, for his claim is disputed, and the surrogate can't try it; and besides he has no claim against the estate. He will thus be at the mercy of an administrator, who is disposed to cheat him. It is within the scope of the official duty of an administrator, to purchase a head-stone, and if it is reasonable and suitable, the estate is bound. If he promises to pay for it himself, and is sued on such promise, he is liable personally, and a personal judgment goes against him, and that is all the cases in 12 *Johnson* and 7 *Cowen* necessarily hold. The estate is not released by any such act: no case holds to that extent. The general understanding is, undoubtedly, as laid down by Dayton, (p. 313,) that although the administrator may be personally liable, still the estate is bound to the extent that the expenses are reasonable. Any other rule would work

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great injustice, and should not be adopted. But, suppose it true, that an administrator, with assets, is liable personally, and not as administrator. It does not follow that the present action cannot be maintained. The defendant, *with assets*, stands in the same position as the first administrator, with assets. The personal liability attaches to whoever has the assets. In this way, the claim would follow the assets, and preserve its charge thereon, which it has by law. Upon this theory, the words, *as administrator*, could be treated as surplusage, as they are in 12 *Johnson*, and the action be good against the defendant personally. The facts are stated in the complaint, and certainly entitle us to relief in some form. The demurrer admits the amount right, acknowledges assets, and the law says it is a charge. What more is necessary to entitle us to a judgment?

II. A fair construction of the allegation in the complaint, is that the defendant was appointed by the surrogate of Monroe county, who made the prior appointment, and whose jurisdiction is alleged. Be this as it may, the subsequent allegation that the defendant is now such administrator is sufficient. It is not necessary for a plaintiff to allege the time or manner of appointment of a defendant administrator. The matter is clearly within the defendant's knowledge, and the plaintiff may use a very general method of pleading. Every thing necessary to constitute the administratorship is included in this averment. (*Voorhies' Code*, 191 a, 8th ed. 3 *N. Y. Practice*, 9. 33 *Barb.* 527.)

M. C. Finley, for the respondent. I. The complaint does not show the appointment of the defendant as administrator of Sanford Hartman, deceased, by any court having jurisdiction. The language of the complaint is, "and the said Albert G. Myrick appointed in his place and stead, and said Albert is now such administrator." This does

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not show by whom he was appointed. For aught that appears, the appointment may have been by the surrogate of some other state, or by a justice of the peace. The state or county in which an executor or administrator was appointed is a material and traversable averment and should be truly stated. (*Code of 1867*, § 142, pp. 188, 189. *Steph. Pl.* 288. *Rightmeyer v. Raymond*, 12 *Wend.* 51. *Morgan v. Lyon*, *Id.* 265. *Ring v. Roxborough*, 2 *Cr. & J.* 418.) The fact that the appointment is by a surrogate of this state, is material to be stated, because the courts of this state can take no notice of letters testamentary or of administration granted abroad, and they can only sue and be sued as such in the state in which they were appointed. (*Morrell v. Dickey*, 1 *John. Ch.* 156. *Williams v. Storrs*, 6 *id.* 353. *Campbell v. Torrey*, 7 *Cowen*, 68. *Vroom v. Van Horne*, 10 *Paige*, 550. *Vermilyea v. Beatty*, 6 *Barb.* 429, 431. *Smith v. Webb*, 5 *Abb.* 482. *Thomas v. Eddy*, 13 *id.* 22. *Gulick v. Gulick*, 21 *How.* 22. *Robbins v. Wells*, 26 *id.* 15.) There is no allegation that he was appointed by any surrogate in the state of New York, or that, being appointed by a surrogate in any other state, he has brought assets of the deceased into this state. It does not allege that this defendant was duly appointed. This question was decided in the case of *Forrest v. The Mayor of New York*, (13 *Abb. Pr.* 350.) In that case the complaint alleged that the plaintiffs were duly appointed and qualified by the surrogate of the county of New York to act as the sole executors of Daniel Fanshaw, deceased. The demurrer was that the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiffs had not legal capacity to sue. The demurrer was sustained. The allegation that "Jacob Hartman was appointed by the surrogate of the county of Monroe, who had jurisdiction for that purpose," does not help the plaintiff. It is not an allegation of jurisdiction to appoint Albert G. Myrick. The complaint does not proceed upon the ground, or allege that the defendant

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has assumed to be or act as administrator so as to conclude him, but solely an allegation that he is administrator, &c. To sustain that, he should allege the acts he will be obliged to prove, to wit, the due and proper appointment by a proper court as such. (8 *How. Pr.* 428. 10 *Bosw.* 292, 301 to 305, and cases cited on p. 298. 16 *Abb. Pr.* 433, 442, 443. 28 *N. Y. Rep.* 454. 31 *id.* 9, 10, 15.)

II. The complaint does not allege any facts showing that the grave stones contracted for Jacob Hartman were suitable to the circumstances of the estate of Sanford Hartman, deceased, and to his rank and circumstances in life. The allegation in that respect is a mere "conclusion of law." The present administrator had a right to know and to controvert the facts in that behalf. (31 *N. Y. Rep.* 9; *vide pp.* 10 and 15.)

III. The defendant is not in any event liable to pay for the head stone contracted for by his predecessor, who has been removed. 1. There is no privity of contract between the plaintiff and defendant. This was not a contract made by Jacob Hartman, in his *representative capacity*, and which his successor became liable upon by virtue of the statute. (See 3 *R. S.* 5th ed. p. 165, § 59.) It was one of those funeral expenses upon which Jacob Hartman became liable individually and not in his representative character. (3d ed. *Dayton's Surrogate*, pp. 313, 314, 318, 482. 12 *John.* 349. *Williams on Executors*, 5th ed. 1621, 1624. *Id.* 3d ed. sub. 2, p. 829, and § 1, note 1522.) This is well settled. (See, also, *Dayton's Surrogate*, 285, 286; *Brice v. Wilson*, 8 *A. & E.* 349, note c.; *S. C. and 3 Nev. & M.* 512; *Corner v. Show*, 3 *Mees. & Wels.* 350, 354, 355; *Tugwell v. Heyman*, 3 *Camp.* 298; *Rogers v. Price*, 3 *Young & Jer.* 28; *Hayter v. Moat*, 2 *Mees. & Welsb.* 56.) It was said by Patterson, J. in *Brice v. Wilson*, that it has been decided that an executor renders himself liable upon an implied promise at common law to pay reasonable expenses for the funeral of the testator, where no other person is liable on an express con-

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tract, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by another person without the knowledge of the executor to whom the credit is given, the executor is liable. It is also laid down that in an action against an executor for the funeral expenses of his testator, the judgment should not be *de bonis testatoris*, but *de bonis propriis*. In this case, Jacob Hartman was and still is liable individually upon this contract, but not Albert G. Myrick. 2. The liability on the part of the administrator to pay for head-stones as a part of the funeral expenses of deceased can never exist unless he has sufficient assets, so that the rights of creditors will not be affected thereby. This complaint contains no allegation showing that there are assets sufficient in the hands of the defendant to pay the debts of the deceased and to pay for these head-stones; unless there is he could not be allowed in his account if he paid for them. The complaint is deficient as to allegations in this respect, as much so as was the one in the case of *Chambers v. Lewis*, (16 *Abb. Pr.* 433. See pp. 442, 443; 28 *N. Y. Rep.* 454; 31 *id.* 9, 10, 15.)

IV. There is no allegation in the complaint that the plaintiff has ever offered to deliver the head-stones in question to the defendant, or ever notified him that he was ready and willing to deliver the same to him.

By the Court, MORGAN, J. The complaint, I think, contains averments sufficient to show that the predecessor of the defendant undertook, in his character of administrator, to contract with the plaintiff for suitable head-stones to be placed at the grave of the deceased, not beyond what would have been allowed to him, under the statutes, in his final account before the surrogate, if he had paid for them before he had been removed from office. The price was \$140, and he had paid but \$40 when he was removed and the

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defendant appointed to take his place. There is no question made but that the defendant has assets properly applicable to the payment of the balance, but it is alleged that he neglects and refuses to receive the stones, or to pay for them, although they were made according to the agreement with the first administrator, and were ready for delivery when called for.

The judge, at special term, while admitting that the contract was one which it was proper for the administrator to make, and that the expense of the head-stones was not beyond the rank or station in life of the deceased, came to the conclusion that no action would lie against the defendant, as administrator, to recover the balance of the purchase price.

Some of the authorities cited and commented upon, show that although funeral expenses, including a suitable monument for the deceased, are chargeable upon the estate of the deceased, the administrator who orders them is *personally* liable and *not in his representative capacity*. So when they are ordered by others and afterwards approved by the administrator or executor. And in case of *necessary* funeral expenses, when there is no one personally liable, the undertaker may sue the administrator and recover them upon an *implied* assumpsit, provided he has assets. It would seem, however, from some of the cases cited, that when there is an express agreement by the administrator to pay, he makes himself liable, personally, and cannot be made liable *as administrator*. If this is the law in this state, then the only remedy of the plaintiff is to sue the first administrator. If he is insolvent, I know of no way under this state of the law by which the amount can be collected. If he is responsible and pays the judgment, then it is admitted in *Green v. Salmon*, (8 Ad. & E. 348;) *Myer v. Cole*, (12 John. 349;) *Demott v. Field*, (7 Cowen, 58;) as well as by other authorities cited, *that the estate would be liable over to him after such payment*.

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This is a most extraordinary position, and yet it seems to be pretty well established by the authorities cited, although not without protest and objection by distinguished judges in other cases.

If the estate is *ultimately* liable, there is no reason why this claim should not be presented to the administrator in the first instance, and why, if he has funds, he should not be required to pay it out of the assets of the deceased. Under the Revised Statutes, the administrator cannot plead want of assets and thus escape the responsibility of a judgment. (*Parker's ex'rs v. Gainer's adm'rs*, 17 Wend. 559.) The only object of the suit is to establish the claim. After judgment, the plaintiff could not have an execution without the order of the surrogate, and then for only so much as was properly applicable to the payment of the plaintiff's claim. (*Id. Allen v. Bishop's ex'rs*, 25 Wend. 415, and also 18 *id.* 666; 12 *id.* 542.)

It was said by Savage, Ch. J. in *Dox v. Backenstos*, (12 Wend. 543,) that the jurisdiction of the surrogate has been extended and enlarged in respect to executors and administrators by the provisions of the Revised Statutes; and that they "have a new character and stand in different relations from what they formerly did to the creditors of the deceased persons with whose estates they are intrusted. They are now the *mere representatives* of the testator or intestate; *they are constituted trustees*, and the property in their hands is a fund to be disposed of for the benefit of creditors, and not liable, as it once was, to be dissipated by bills of costs, created by the anxiety of creditors to obtain the first judgment and thus secure the payment of their debts to the prejudice, perhaps, of others. Now a more equitable rule prevails; no preference is allowed among debts of the same class." In *Parker's ex'rs v. Gainer's adm'rs*, (17 Wend. 561,) Cowen, J. says: "The old system of preferential administration having been almost entirely subverted, all the pleadings and other parts of the ancient

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superstructure in so far as it was raised for the protection of that system, have gone with it." And in *Butler v. Hemptead's adm'rs*, (18 Wend. 666,) the court came to the conclusion that there was no necessity for an executor or administrator to defend a suit commenced against him, except for the purpose of fixing the amount in controversy.

These cases show two things: 1. That the administrator could not defend this action upon the ground of the want of assets, but only to defeat it as a claim against the estate, or reduce its amount. 2. That he is now regarded as a *trustee for creditors*, as well as the representative of his intestate.

It is therefore clear that as a trustee, having in his hands the assets of the estate to be disposed of by him, among other things, to pay the funeral expenses of the deceased, he ought in justice and equity to pay this demand, unless he can show that the estate is not ultimately liable. The question of assets, &c. is a matter entirely for the surrogate, and cannot be brought into these pleadings.

Now if there is any technical rule of law which allows this defendant to defend the action merely because the first administrator may have made himself personally liable on the contract, it is time the foundation of it should be examined, and if it cannot stand consistently with our present system of pleadings and the new duties of executor and administrator as defined by the Revised Statutes and the decision of the courts in other cases, it may as well be overruled and swept out of the way.

The reason of the rule, as stated in the books, is that an executor or administrator cannot create a debt against the deceased. This is exceedingly technical, but I apprehend that the authorities cited for the defendant all rest upon it for their support, so far as they deny that an executor or administrator, as such, can be sued for the funeral expenses of the deceased.

The law is, however, too well established to admit of

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question, that an executor or administrator, by ordering such expenses makes himself personally liable for them. This is one proposition, but it does not necessarily follow that the estate he represents may not also be liable. Indeed, if there are assets, it is admitted that the estate is ultimately liable.

Authorities may be cited to show that the creditor may have his election either to charge the executor or administrator personally, or the estate. It is easy to see that under the former system of pleadings, when the declaration showed that the executor or administrator had promised to pay these expenses, the plaintiff was entitled to a personal judgment, whether the estate was ultimately liable or not. This being so, it followed that such a count could not be joined with a count for a debt created by the deceased, as the judgment in the latter case was necessarily *de bonis testatoris*.

The execution followed the form of the judgment, and as there could not be two judgments in the same action, authorizing different executions, it followed as a necessary conclusion that the two counts could not be joined in the same action. No such question can arise in this case, as the only object of the action is to charge the estate. If it is therefore admitted that it is a case where the first administrator could be prosecuted for the same demand, he is not a party to the action, and no judgment is to be pronounced against him in either form. It is respectfully submitted that in most if not all the cases cited to support the defendant's objection, the only question really involved was, whether the executor or administrator was *personally* liable upon the contract stated; not whether upon a *given state of facts* a suit could not be sustained against him as administrator to charge the estate. As he was personally liable upon the facts stated, it followed that the plaintiff was entitled to a judgment against him *de bonis propriis* although the estate might be ultimately liable. This pro-

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duced the misjoinder of counts complained of, and is the foundation for the decisions cited to sustain the proposition that an administrator cannot create a debt against the estate, which he represents. It is, however, questionable whether an objection of this character is any longer available, under our system of pleadings, in view of the equitable jurisdiction of the court to determine in one action the ultimate liability of the parties before it, even as among the defendants themselves. (*Code of Procedure*, §§ 122 and 274.) By another provision of the Code, every action may be prosecuted in the name of the real party in interest, (§ 111;) but what is of more importance is, that *all persons* having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, *and any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.* (*Code*, §§ 117 and 118.) In view of these several provisions, the judgment may be moulded in such form as to protect the rights of all parties.

When it is admitted that the estate is ultimately liable for the payment of the funeral expenses incurred by an administrator, there is no longer any reason why it should not be a party although the administrator may be personally liable for the same demand. The estate is a proper party, as it is ultimately liable for the payment of the demand. (*Code*, § 168.)

Let it be admitted that Jacob Hartman, the first administrator, may be sued by this plaintiff. Clearly this defendant may be joined as a party, for the estate he represents has an interest adverse to the plaintiff, and is a necessary party to a complete determination or settlement of the question involved therein. The court is authorized in giving judgment to determine the ultimate rights of the defendants as between themselves. (*Code*, § 274.)

If Jacob Hartman had been made a party defendant in

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this action, what would be the judgment upon the facts stated in the plaintiff's complaint? If we follow the law as laid down in the cases cited by the defendant's counsel as to the form of reaching the assets in the hands of the defendant, for the payment of the plaintiff's debt, the judgment would first determine that Jacob Hartman, who ordered the gravestones, *was personally liable* and an execution might issue against him *de bonis propriis*. Secondly, on payment of the judgment by him, an execution might issue against his successor, *de bonis testatoris* to reimburse himself for what he had thus been compelled to pay. This would be a strict determination of the rights of the defendants as between themselves, according to the theory of the defendants.

But it will be seen that there is a good deal of unnecessary circumlocution here, and that the first administrator is not a necessary party, except when it is desirable to charge him personally with the same debt. It follows, I think, that this action is well brought against the defendant as administrator, and that a demurrer will not lie because another person may be liable for the same demand, as upon the facts stated, the estate, being ultimately liable, had no interest in that question. If the original administrator had been allowed for this claim in his accounts before the surrogate it may be necessary that he should be brought in as a party before a final determination of the controversy can be made. It will be time to answer the questions growing out of such a state of facts when they arise.

Thus far I have discussed the question upon the theory that Jacob Hartman had made himself personally liable by his contract with the plaintiff. Without now undertaking to dispute the general proposition, that an administrator, with or without assets, assumes a personal liability for funeral expenses, in the absence of any special agreement, I think the law is now settled in this state,

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authorizing him to contract with the undertaker *on behalf of the estate* and to charge the assets in his hands with the payment of the expenses.

So far as the authorities cited deny the right of the administrator to bind the estate by such an agreement, they must be deemed to have been overruled in *Chouteau v. Suydam*, (21 N. Y. Rep. 179.) It was held in that case that an administrator, like a trustee, might enter into a written contract charging the estate with moneys received by the administrator and which he neglected to pay over to the persons entitled to them under the terms of the contract. The learned judge, who delivered the unanimous opinion in *Chouteau v. Suydam*, says: "When it is sought to charge the estate with a contract made by the executor or administrator, two questions arise, viz. 1st. Was the contract *intended* and understood to be made by the executor or administrator, &c. personally or in his representative character only? and 2d. If intended as such, was the contract such an one as would properly have that effect?" He then proceeds to show that the contract in question was signed by Charles Suydam, *executor*, and *prima facie* was intended to charge the estate, as it related to a matter in which the executor had no personal interest. He then proceeds to show the contract was beneficial to the estate and one which the executor, in the proper discharge of his *trust*, was authorized to make. It will be observed that in dealing with the question, the judge places a good deal of weight upon the authority of the executor as *trustee* of the estate, as distinguished from his character as the mere personal representative of the testator. The executor, he says, would be wanting *in fidelity to his trust* if he had failed to enter into the arrangement. (Page 183.)

And in another case, in the same court, (*Noyes v. Blake-man*, 2 Seld. 567,) a similar question arose as to the incidental authority of a trustee to make a contract binding

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upon the *trust* estate, and it was held that he might create a debt and charge it upon the future income of the estate, without personal responsibility, when it was necessary to protect the estate. Two of the judges (Gardiner and Jewett) dissented, on the ground that the trustee could not avoid personal responsibility and create a lien upon the estate for the expenses attending its preservation—the very ground upon which the demurrer was sustained in the case at bar, if I have not entirely misapprehended the question.

And, in both cases, it was further determined by the same court, that after the removal of the administrator or trustee, and a new one appointed, the trust estate in the hands of the new trustee remains subject to the charge.

There is still another authority which ought not to be overlooked in this connection, in *the matter of Tompkins' estate*, (41 Barb. 237.) There, it seems a judgment had been obtained in the Supreme Court after a trial upon the merits, against the administrator, for proper counsel fees, incurred by him in the course of his administration.

It does not appear that the administrator resisted the claim in the Supreme Court, upon the ground taken by the defendant here, although that precise question was undoubtedly involved in the issue. Upon application to the surrogate for execution upon this judgment, the question was raised, that it was not a debt "*due by deceased.*" He having ordered execution, an appeal was taken to the Supreme Court at general term, and the order of the surrogate was affirmed; the judge, who delivered the opinion of the court, holding that the demand was one properly chargeable upon the estate. The principle to be deduced from these authorities is that an executor or administrator, as such, may bind the estate by a contract entered into by him within the scope of his authority as trustee of the estate, or he may make himself personally liable upon the same contract.

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Regarding the administrator as a trustee of the estate, as well as the personal representative of the intestate, he had an undoubted right to charge the estate in his hands, by any agreement which the law authorized him to make in the proper and necessary discharge of his trust.

The only remaining question is, whether the complaint charges the agreement in question to have been made *on behalf of the estate*, and whether it is such an agreement as he was authorized to make in the proper discharge of his duties as administrator of the estate. Both of these questions have already been answered in the affirmative. The complaint expressly charges "that the said Jacob, *as such administrator*, made and entered into a contract with the plaintiff" to furnish the gravestones. That they were suitable and not beyond the means of the estate is also admitted by the demurrer. In other words, the expenses were no more than would be allowed to him by the surrogate on his final accounting, if he had paid for them before he was removed from his trust.

On the whole, I have come to the conclusion that the plaintiff is entitled to judgment, upon the broad ground that an administrator in this state, as a trustee of the estate, may create a charge upon it for expenses attending his administration which he is authorized to incur in the proper discharge of his trust. So much is, I think, established by the decisions in the Court of Appeals, already referred to, though not without considerable opposition, and the dissent of two of its most eminent jurists.

The order appealed from should be reversed, with costs, and an order entered overruling the demurrer, with leave to the defendant to answer the complaint upon the usual terms.

Ordered accordingly.

[ONONDAGA GENERAL TERM, JANUARY 5, 1869. *Foster, Mullin and Morgan*, Justices.]

53	98
126a	44
53b	98
22ap	607

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE NORTHERN RAILROAD COMPANY and others.

A motion for a stay of proceedings in an action, on the ground that another suit is pending which embraces the same matters, will not be granted where the parties to the two actions are not the same, and it does not appear that the entire relief demanded and sought for in the one action could be awarded in the other.

Such a motion is, if not exclusively, certainly to a very great extent, addressed to the discretion of the court at special term; and so far as it is of that character, the decision of the court cannot be overhauled on appeal.

Where the material allegations of a complaint, in an action by the people, against a corporation, for its dissolution, are not denied by the answer, and it thus stands admitted of record that the corporation has forfeited and surrendered its charter and franchise, it would not be a proper exercise of judicial authority to stay the proceedings on the ground of another action pending, in which the corporation is plaintiff, the effect of which would be to prevent the entering of the judgment required by the law to be awarded, and to permit the corporation to continue in the use of its corporate rights.

Where the complaint in such an action alleged that the corporation was insolvent in 1854; (thirteen years before) that it then surrendered its property to its creditors; that it had remained insolvent ever since; had ever since neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and lawful business; and that another corporation with the same general object had, under the authority of the state, organized and was in actual operation in its place and stead; which facts were not denied in the answer, although the alleged forfeiture was attempted to be excused; *Held* that it was a proper case for a judgment of forfeiture, dissolving the corporation, and restraining defendants who were charged with usurping and attempting to exercise its franchise from further exercising the same, and imposing a fine for its previous unlawful use.

Held, also, that the fact of insolvency and suspension of business being admitted in the answer, the law admitted no excuse for the forfeiture, nor was any explanation available.

Held, further, that there being no issue in the case to be settled or determined by evidence, and no trial being necessary, beyond an application of the law to the facts, it was the right of the plaintiffs to apply to the court, at special term, for judgment, on the pleadings.

The judgment of forfeiture, given in such a case, may direct the appointment of a receiver of the corporation; notwithstanding section 444 of the Code makes it the duty of the attorney-general, immediately after the rendition of such judgment, to institute proceedings for that purpose. That provision of the Code was intended to cover the case where no receiver was appointed in the judgment, but does not prevent the court from rendering complete and perfect relief in and by the judgment itself.

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THIS action is in the nature of a *quo warranto*, to dissolve a corporation known as the Northern Railroad Company, and for other relief.

The complaint charged that the corporation received its charter under an act of the legislature, passed in 1845; that it became and was insolvent in October, 1854, and had ever since remained insolvent; since which time it had neglected to pay its notes and other evidences of debt, and entirely suspended its lawful and ordinary business; that it had surrendered its franchise to the government; and that the three natural persons named as defendants with the corporation had usurped and unlawfully attempted its use and exercise after such forfeiture and surrender. The company and the three persons joined with the corporation, as defendants, answered the complaint, jointly.

The plaintiff insisting that the answer contained no denial of any material allegation of the complaint, moved the court, at special term, for judgment against the defendants on the pleadings; and the defendants at the same time moved to stay the proceedings in this action until the determination of another suit pending in this court, wherein the Northern Railroad Company was plaintiff and the Ogdensburgh and Lake Champlain Railroad Company and others were defendants; which suit, as was alleged, embraced the same matters presented for adjudication in this action. The court denied the motion to stay, and gave judgment against the defendants on the pleadings for the relief demanded in the complaint.

The following opinion was delivered by the justice, at the special term:

JAMES, J. The counsel for the defendant first interposed, as a preliminary objection, that this cause could not be brought on for hearing at special term, but should go upon the circuit calendar, and be tried by a jury. By the Code, (§§ 253, 254, 255,) all issues except in actions for

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the recovery of money only, or of specific real or personal property, or for divorce on the ground of adultery are triable by the court, and may be tried at circuit or special term. (*Rule 28.*) As this action is not within either of the exceptions in section 253, it follows that it may be tried at special term. The motion is therefore denied.

The Revised Statutes (*vol. 2, p. 463, § 38.*) enact that "whenever any incorporated company shall have remained insolvent for one whole year, or part of one year, shall have neglected or refused to pay and discharge its notes, or other evidences of debt; or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges and franchises granted by the act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved."

The Code, (§ 430,) provides that an action may be brought by the attorney-general, in the name of the people of the state, for the purpose of vacating the charter, or annulling the existence of a corporation, other than municipal, "whenever such corporation shall have forfeited its privileges or franchises by failure to exercise its powers, or done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises," and it is made the duty of the attorney-general to apply for leave, and when granted to bring the action.

The complaint distinctly alleges facts which bring this case within the provisions of section 38 of the Revised Statutes above quoted.

The answer is one which would have been stricken out on motion, as sham and irrelevant. It is, in form, a violation of the express requirements of the Code. Section 149 requires the answer, to contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge thereof, sufficient to form a belief;" and section 168 declares that



"every material allegation of the complaint not controverted by the answer, as prescribed in section 149, shall for the purposes of the action be taken as true." None of the material allegations of this complaint are so controverted by the answer. The defendants do not claim that the answer contains a general or specific denial of such material allegations; they only claim that it contains a denial of each and every allegation, "not in the answer specifically admitted or denied." That is not what the Code authorizes or requires. It does not authorize or require admissions; and denials are required to be general or specific, not dependent, contingent or constructive, nor to be spelled out from irrelevant and immaterial matter. Such an answer may be convenient to enable a defendant to escape the penalty of perjury, but it is not authorized by the Code, and does not amount to a denial of any material allegation of the complaint.

This answer demonstrates the wisdom of the Code, in limiting the denials in an answer to general or specific denials, and the necessity of strictly adhering to those requirements. It contains 161 folios; if well pleaded the court is required to wade through these 161 folios to ascertain what is specially admitted, or specially *denied*, in order to determine what is *denied*. This answer seems to be an old complaint remodeled and varnished; its statements are often confused and incongruous, and it is sometimes difficult to determine whether a statement is intended for an admission or a denial; as, when it admits a judgment against the corporation and then asserts it void.

But the Code declares that every material allegation in a complaint, not controverted by the answer, as prescribed by section 149 is, for the purposes of the action, to be taken as true; none of the material allegations of the complaint in this case are so controverted. It therefore follows that they stand admitted, and being so admitted, the plaintiff is entitled to the judgment demanded.

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But a careful examination of the answer would show the admission of the incorporation of the Northern Railroad Company, its construction of a road from Ogdensburgh to Rouse's Point; that a certain portion of the cost of said road was paid for by capital stock subscribed and paid in, and the balance was obtained on bonds secured by mortgages upon its roads, &c. that one or more of said mortgages was sought to be foreclosed, a decree of sale obtained, a sale of the roads, &c. had, and possession taken under such sale, over ten years ago; that a balance is due and unpaid on said bonds and has been for several years; that said corporation is not in possession of said road or its franchises, and has not been for years; that its ordinary and lawful business has been suspended for over ten years; and that unless such bonds and mortgages can be repudiated in whole, or in part, it is wholly insolvent. This covers the whole ground of the complaint; brings the case clearly within the statute above cited; and as between the people and the corporation, demands its dissolution.

The people have nothing to do with the alleged illegal and fraudulent acts of the directors and trustees of said corporation and others, as set forth in the defendants' answer. Such acts, if committed, do not constitute any defense to this action, but on the contrary, furnish cumulative reasons why the corporation should be dissolved, and its assets put into the hands of a responsible receiver.

This is sufficient to dispose of the case, so far as the Northern Railroad Company is concerned; for if its dissolution has not been made complete by the statutes and proceedings set forth in the answer, it would be by the decree which must be entered in this action.

In respect to the liability of the individual defendants to punishment for the alleged violation of law in setting up and using a franchise within this state without lawful authority, it is necessary to inquire whether the franchise

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was gone from the Northern Railroad Company at the time of the acts complained of.

That said company had, for more than a year, suspended the ordinary and lawful business for which the franchise was granted by the state, appears by the answer. It shows such suspension ever since 1854. This alone is sufficient to amount to a surrender. The statute is peremptory in saying that upon any such default for one year, the corporation "shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved." In the language of Judge SUTHERLAND, in *Bank of Columbia v. Attorney-General*, (3 Wend. 596,) "no explanation is admissible."

Did such a surrender *ipso facto* dissolve the corporation? Or, what was necessary to make the dissolution complete? These questions were tersely answered by the Court of Appeals in *Bradt v. Benedict*, (17 N. Y. Rep. 99.) It says, "As a general rule, to constitute a dissolution of a corporation by a surrender of its franchise, the surrender must be accepted by the government, or a default must be judicially ascertained and declared." The complaint shows, that in this case the surrender was accepted by the government, and also that it is judicially ascertained and declared. The answer puts in issue the validity of the judgment of dissolution, but it sets forth the statute of March 31, 1857, being the "act to provide for the formation of a corporation in place of the Northern Railroad Company, dissolved," &c. and alleges the regular formation of a railroad corporation under it, to wit, the Ogdensburgh Railroad Company in 1858, to which corporation, by the terms of the act, the rights to the franchise became transferred, so far as the assent of the state was necessary. The answer also sets forth the amendment of April 8, 1864, to act of 1858, under which it appears that the Ogdensburgh and Lake Champlain Railroad Company became incorporated.

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By each of these statutes, the legislature accepted the surrender of the franchise before granted to the Northern Railroad Company, and provided for conferring it upon another corporation. The old corporation was, therefore, "dissolved in fact" and likewise dissolved in law as early as 1858. It necessarily follows that the defendants should be adjudged guilty of usurping and using, without lawful warrant or charter, the franchise of being a corporation as charged.

Judgment must therefore be given, declaring the Northern Railroad Company dissolved, appointing a receiver and making the injunction against the defendants perpetual, and in favor of the plaintiffs for costs against the defendants who joined in the answer, and that the defendants be fined in a sum to be fixed on the settlement of the decree, to be collected and paid into the treasury of the state.

In most cases the usurpation of a franchise not granted, is not a very serious offense, as it does not materially injure the state, or its citizens; but in this case the usurpation is of a serious character, and its necessary tendency was to unsettle and depreciate the value of the franchise subsequently granted by the state, and hindering and obstructing the corporation holding it, and carrying out the beneficent objects for which it was granted.

Judgment being entered accordingly, the defendants appealed from the order and the judgment.

C. C. Langdell, for the appellants. I. The defendants' motion to stay proceedings ought to have been granted. (*McCarthy v. Peake*, 18 *How. Pr.* 138. 9 *Abb. Pr.* 164.) The ground upon which it is understood to have been denied, was that the parties to the two actions were not the same, and that the rights of the people could not be affected by any thing which had taken place between the two railroad companies. But the rights of the people are

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not at all in question, and they are only formal parties to the suit; they have merely lent their name to the Ogdensburgh and Lake Champlain Railroad Company under the provisions of a statute, and the latter are the real plaintiffs in the suit. In the English practice, when a *quo warranto* is brought in the interest of the public, the information is filed by the attorney-general on his official responsibility, without any relator and without any application to the court; but when the crown merely lends its name to a private party, the information is filed by the master of the crown office, after leave obtained from the court; and the suit is regarded, for all practical purposes, as a mere private suit between the relator and the defendant. (*Cole on Informations*, p. 113.) The same distinction exists with us, though not so strongly marked. (*Code*, §§ 430, 434.) Undoubtedly, in a strict legal and technical sense, the people are the plaintiffs and the only plaintiffs in the suit; but in making a motion to stay proceedings, the defendants were appealing peculiarly to the equitable jurisdiction of the court, and the court had the power, and it was its duty, for the purposes of that motion, to look beyond the record, and ascertain who were the real parties in interest. In this connection also, the court will consider whether leave to commence the suit ought ever to have been granted. When a private citizen wishes to wield the sovereign power of the people by bringing a suit in their name, it is obvious that his right to do so should either be carefully limited and defined by rules prescribed for that purpose, or it should be subject to a very large discretionary power in some department of the government. In this state, the latter course has been taken, and this discretionary power has been reposed in the Supreme Court. By the letter of the law, the attorney-general has no discretion at all, it being made his duty to proceed whenever he shall have reason to believe that a case can be made out which will entitle the people to recover. (*Code*, § 430.)

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The discretion of the court, on the contrary, is unlimited, and it exercises the entire sovereign power of the state on that subject. The judge, therefore, before granting leave to commence the suit, should have inquired, not merely whether a case could be technically made out against the defendant, but whether it was a case in which a private party should be permitted to wield the sovereign power of the people; and for that purpose he should have directed notice to be given to the accused corporation, and heard what it had to say upon the subject. Such has always been the practice of the English courts under statutes similar to our own. (*Cole on Informations*, p. 165, *et seq.*) Thus, in *Rex v. Wardroper*, (4 Burr. 1964,) Lord Mansfield said: "The court must exercise a discretion. It would be very grievous if the information should go of course; and it would be a breach of trust in the court to grant it as of course. On the contrary, the court are to exercise a sound discretion upon the particular circumstances of every case." So in *Rex v. Parry*, (6 A. & El. 810,) Lord Denham said: "The argument at the bar, in support of the present rule did not, and could not, stop short of denying all discretion in this court as to originating proceedings in *quo warranto*. It was in effect asserted that wherever a reasonable doubt is raised as to the legal validity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous,) which has turned upon the interest, motives or conduct of the relator, proceeds upon the principle of the court's discretion; however clear in point of law the objection may have been to the party's abstract right to retain his office, yet the court has again refused to look at it, or interfere upon one or other of these grounds;" *i. e.* upon the ground that the relator had no interest in the question which authorized him to interfere, (*Cole on Informations*, p. 172,) or that his motives appeared to be such as not to entitle him to the favorable

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consideration of the court, or that his conduct had been such as to estop him from making the application.

Judged by these rules, in what light does the Ogdensburgh and Lake Champlain Railroad Company stand? What interest had they, and what were their motives in applying for leave to commence this suit? A suit had been brought against them by the Northern Railroad Company, in the ordinary course of legal proceedings, and they, instead of pursuing the ample remedies provided by law for all litigants, had the assurance to ask the sovereign people to interfere in their favor, and end the suit without a trial, by destroying their adversary. Any person who happens to be sued by a corporation might make a similar application with equal propriety, if he could discover that the corporation had ever, by accident or misfortune, rendered itself technically liable to a forfeiture of its charter. In one respect, indeed, the suit brought by the Northern Railroad Company is out of the ordinary course, for it alleges that the very acts and omissions which are relied upon as a ground for forfeiting its charter, were caused by the fraud of persons under whom the Ogdensburgh and Lake Champlain Company make title, and with whom they are in legal privity.

II. The court below erred in entertaining an application for judgment on the pleadings as a non-enumerated motion. 1. Such an application can only be made when the cause has been reached in its order on the calendar, and is brought on for trial, pursuant to a notice for that purpose. The practice is not derived from the Code of Procedure, but from the former practice in chancery of bringing a cause to a hearing upon bill and answer. (1 *Van Santvoord's Eq. Pr.* 467, 468.) 2. It is obvious, both from the origin of the practice and from its nature, that it can only be employed in equity cases. In cases triable by a jury, there must either be a demurrer, or the verdict of a jury, unless a jury trial is waived. 3. In the present

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case the defendants were entitled, by the constitution, (*art. 1, § 2,*) to a trial by jury. It is scarcely necessary to observe that, at the time of the adoption of the constitution, an action of the nature of the present was not only triable by jury, but was in form a criminal proceeding. The learned judge was undoubtedly right in saying that this case was not within the terms of section 253 of the Code of Procedure, and the defendants never claimed that it was; but that section was evidently left in its present condition through an inadvertence, and must give way to the constitution. Section 253 was adopted substantially in its present shape in 1848, while actions in the nature of *quo warranto* were not provided for until 1849; and upon the adoption of title 13 in the latter year, the legislature neglected to make the necessary change in section 253.

III. The application for judgment should have been denied upon the merits. 1. The whole gist of the complaint, without which the action falls to the ground, is contained in folios 8, 9; and that is fully denied in the answer. The form of demand is in entire conformity with the requirements of the Code of Procedure. (*Parshall v. Tillou*, 13 *How. Pr.* 7.) 2. Assuming that the answer is open to the criticisms made upon it by the court below, it does not follow that all the allegations in the complaint are to be taken as admitted. If a pleading fails to comply in form with all the requirements of the law, it can be corrected by motion, at the expense of the party who has committed the fault; but to treat it as a nullity is as hostile to the spirit of our present system of practice as it is inconsistent with every idea of natural justice. The words "as prescribed in section 149," were inserted in section 168 of the Code of Procedure for the mere purpose of reference and explanation, and they do not warrant the construction placed upon them by the court below. Section 149 is merely directory, and a compliance

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with its provisions is to be enforced by motion. 3. The plaintiffs were not entitled to judgment upon any admissions contained in the answer. When a plaintiff seeks to make use of allegations in an answer as admissions, he must take the whole of the allegations, as well the facts which make against him as those which make in his favor. Bearing this in mind it will be found that, although the answer admits an attempt to foreclose the second mortgage, it alleges that the pretended foreclosure was without notice to the Northern Railroad Company, and was fraudulent and void; and that the second mortgage trustees, while they held possession of the road, were only mortgagees in possession, and that the Ogdensburgh and Lake Champlain Railroad Company, since it came into possession of the road, has had no other or greater rights than those of a mortgagee in possession. So, also, although it may be admitted indirectly in the answer that a balance is due upon the face of the second mortgage bonds, yet it denies the validity of those bonds. Therefore, the answer does not admit any of the acts charged in the complaint as a cause of forfeiture. It clearly does not admit insolvency, nor a neglect of the Northern Railroad Company to pay its notes or other evidences of debt; nor does it admit that said company has suspended its ordinary and lawful business as a corporation, for it alleges that the road has always been run, either by itself or by those who acted on its behalf as mortgagees in possession, and who were accountable to it for all their acts.

IV. The court below erred in holding that by the acts of March 31, 1857, and April 8, 1864, the legislature accepted the surrender of the franchise before granted to the Northern Railroad Company. Both of those acts were private acts, to which the Northern Railroad Company was a total stranger, and by the well settled rule, they could have no effect whatever upon its rights. (*Catlin v. Jackson*, 8 John. 520, 555 *et seq.* 1 *Kent's Com.* 459, 460.)

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V. The court below had no authority to enjoin the defendants and appoint a receiver. 1. The authority contained in section 444 of the Code of Procedure is expressly limited to proceedings instituted for that purpose, *after* the rendition of *judgment* dissolving the corporation. 2. Section 444 only gives the same power that is given in article 3, title 4, chapter 8, part 3 of the Revised Statutes; but upon examining that article it will be found that it gives no power whatever to issue an injunction or appoint a receiver. It is confined entirely to the voluntary dissolution of corporations.

M. B. Champlain (attorney-general) and *Wm. C. Brown*, for the respondents. I. The defendants' first point is that the motion to stay proceedings should have been granted. They claim that the parties to the two actions are *substantially* the same. It would be a sufficient answer to say the courts never stay proceedings in one action to await the result of another, except when the parties are not only, in the opinion of some persons, substantially the same, but only when they are *precisely* the same. In this case the state is not merely a nominal plaintiff, but the real plaintiff in interest. The government grants corporate franchises only to be used for the public good and withdraws them when not so used. It is the duty of the attorney-general to bring all such actions as the present whenever he has knowledge of the facts; and the action is no less by and in behalf of the people because he waits until information and security is given to him, pursuant to the 430th section of the Code. He must bring the action whenever he has reason to believe it can be maintained, and in all other cases upon receiving satisfactory indemnity. It is as much the action of the state as any other action, civil or criminal, brought in the name of the people to enforce the laws. And, besides, the state alone is interested in the fine imposed. (*Code*, § 441.) The

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defendants' counsel, therefore, is quite mistaken in referring to this action as one in which a private party is permitted to "wield the sovereign power of the state." He might as well assert that any man who enters a complaint before a grand jury and procures an indictment which the district attorney is compelled to prosecute, "wields the sovereign power of the state;" and that the trial of the indictment should be stayed until the prisoner should bring to trial an action he commenced against the complainant upon some kindred subject.

The claim that the Ogdensburgh and Lake Champlain Railroad Company is in legal privity with the officers of the Northern Railroad Company is so absurd that it might well be passed unnoticed. The Ogdensburgh and Lake Champlain Railroad Company is composed of those, and the assignees of those, who were the creditors of the Northern Railroad Company, and by reason of that relation alone came into possession of the property. The idea that a creditor is to have the sins of his debtor visited or reflected upon him by reason of any "legal privity," is quite new, and based upon no reason or authority.

II. The cause was properly brought to a hearing at special term and by motion for judgment upon the pleadings. The defendants claim that they were entitled to a trial by jury under article 1, section 2 of the constitution, which says: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." But a trial by jury has never "been heretofore used," except when there has been a material issue of fact to be determined. Even a person accused of crime is not, and never was, entitled to a trial by jury unless he denies the crime imputed to him; and no case, civil or criminal, was ever triable by jury unless there was a material issue of fact presented by the pleadings. Whether the legislature were or not guilty of an inadvertence in not amending section 253 of the Code, after the adoption of the law of 1849, is

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entirely immaterial, because whether in cases of *quo warranto* the trial shall be by jury or not, it is certain it cannot be by jury when no material issue of fact is presented.

III. Judgment was properly given for the plaintiffs upon the pleadings.

We are quite willing to accept the statement of the learned counsel for the defendants that the *gist* of the complaint is in folios 8 and 9, but respectfully object to the statement that it is denied by the answer. The material statements referred to in those folios, without which "the action falls to the ground," are that the corporation was insolvent in October, 1854, ever since remained insolvent, neglected to pay its notes and other evidences of debt, and suspended the ordinary and lawful business of such corporation. To make an issue for trial by jury it was necessary for the defendants to deny these allegations in the disjunctive and aver that neither of those conditions of things had continued for one whole year. But it is evident from the answer itself, as it is by facts of public notoriety, and emblazoned upon the records of this court, that no such denial could be made without subjecting the person verifying the answer to conviction for perjury. An admission of the substance of either of these three allegations, entitles the plaintiffs to judgment. And a careful examination of the answer will show that they are all substantially admitted.

Again, the answer shows all through its entire scope that the Northern Railroad Company has suspended its ordinary and lawful business ever since 1854. Its whole burden is of complaints against its own officers for ruining its credit, wasting its property and depriving it of the possession and control of the road. The pretense in the defendants' points that the answer alleges that "the road has always been run, either by itself or by those who acted on its behalf," finds no warrant in that document. Its averments are that the trustees of its creditors seized the

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road, obtained possession and at least an apparent good title under judicial process, and held and operated the road as trustees under appointment of this court, for the benefit of creditors and in hostility to the Northern Railroad Company, until they transferred by order of the court to their *cestuis que trust* on their becoming incorporated as the Ogdensburgh and Lake Champlain Railroad Company. For either of those acts or omissions the statute peremptorily declares the corporation shall be dissolved. As was said by SUTHERLAND, J. in *Bank of Columbia v. Attorney General*, (3 *Wend.* 595, 6,) "no explanation is admissible." In *Bradt v. Benedict*, (17 *N. Y. Rep.* 93,) the court say this section (38th) is substantially cumulative. "A series of decisions in this state had established the doctrine that if a corporation suffers acts to be done which destroys the end and object for which it was instituted, it is equivalent to a surrender of its rights." (*Slee v. Bloom*, 19 *John.* 456. *Briggs v. Penniman*, 8 *Cowen*, 387. *Bank of Poughkeepsie v. Ibbotson*, 24 *Wend.* 473.) The statute goes much farther, and provides that a mere suspension of the ordinary business of the corporation (for one year) shall operate as a surrender." The great labor of the answer in our case is to make out excuses and palliations for the suspension; not to deny the fact. But the statute admits of no excuses. It is peremptory, emphatic, and leaves nothing to the discretion of the attorney-general or of the court.

IV. Even upon the common law rule, aside from the statute, the allegations of the complaint and admissions in the answer establish a case demanding judgment of dissolution. (*Slee v. Bloom*, 19 *John.* 456. *Brinckerhoff v. Brown*, 7 *John. Ch.* 217. *Briggs v. Penniman*, 8 *Cowen*, 387.) In the latter case, (page 391,) Judge Woodworth approves the rule as established by previous cases, viz: That "if a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to

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a surrender of its rights." Now, in our case the Northern Railroad Company had clearly suffered acts to be done which destroyed the end and object for which it was instituted. Its franchise was granted with the object that it should, as a corporation, subject at all times to the control of the legislature, construct a railroad and carry freight and passengers thereon under regulations prescribed or to be prescribed by the legislative authority. The legislature could limit rates of fare and freight, and could make any changes they deemed proper in regard to the management and use of the property, so long as it was in the possession of the corporation, and could require the corporation to make returns, &c. But the legislative control ceased when the property passed from the corporation to trustees, who are to all intents and purposes receivers, subject to the orders of the court, and representing titles and rights vested in them when they took the property and which could not be withdrawn or curtailed by the legislature. The trustees, acting as receivers in possession, might lawfully, with the authority of the court, have sold the land, rails, cars, buildings, &c. separately, for purposes foreign to those for which the franchise was granted. The court would probably have interfered to prevent any thing of this kind as improvident and not beneficial to creditors, or the legislature might have passed some law to prevent it; but the point seems clear that the Northern Railroad Company had suffered (against their will, if you please,) acts which rendered them incapable of fulfilling the purposes for which the franchise was granted, and destroyed, so far as they were concerned, the end and object for which that corporation was instituted. It is no answer to say that their successors have substantially carried out the purposes of the franchise. Those who did it, so far as it has been done, were not the agents of the Northern Railroad Company, but holding adversely to them and acting solely for creditors. This corporation, the Northern Railroad Com-

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pany, had not "the moral or legal capacity to resume its business," and was therefore dissolved, independently of the statute. (*See Bradt v. Benedict*, 17 N. Y. Rep. 93.)

V. The surrender had been accepted by the government and had been judicially ascertained and declared before the commencement of this action. 1. By the acts of March 31, 1857, and April 8, 1864, the government had accepted the surrender. These acts provide "for the formation of a corporation in place of the Northern Railroad Company, dissolved." This is the purpose named in the titles of the acts. The body of the acts authorize and require the second mortgage trustees, who the acts say, "hold in trust for the benefit of the holders of the second issue of bonds, the property, privileges and franchises lately of the Northern Railroad Company by purchase, pursuant to the decree of the Supreme Court," &c. to call a meeting of their *cestuis que trust*, the bondholders, to organize a corporation "as authorized by the said decree of foreclosure," &c. The acts then provide the details of proceedings for the formation of the new corporation. Its capital to be the amount of the principal of the second mortgage bonds. And the acts provide for a transfer of the property to the new corporation, subject to the mortgages to the first mortgage trustees; and for a new mortgage to the first mortgage trustees, to embrace "all the property, rights, powers, privileges and franchises of the said company, including the franchise to be a corporation," &c. And section seven of the act of 1864, provides, "Should any difference of opinion arise as to the right of the said corporation to the transfer hereinbefore provided for at the time when claimed, the said corporation may apply to the Supreme Court of this state, at any general term thereof, for an order instructing the trustees to make such transfer. The court shall direct notice to be given by publication in the manner provided in the first section of this act to all persons who have heretofore been

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made parties to any and all decrees heretofore made by the Supreme Court of this state in respect to either of the mortgages heretofore executed by the Northern Railroad Company, and shall make such determination therein as shall be just and equitable." We have here the most clear and unqualified recognition by the government of the forfeiture and surrender of the franchise by the Northern Railroad Company; and the acceptance of that surrender by provision to confer the franchise on a new corporation. These acts are alleged in the complaint and not denied, but expressly averred, in the answer. The incorporation of the Ogdensburgh and Lake Champlain Railroad Company pursuant to said acts, and the transfer to them, are averred in the complaint and not denied in the answer.

2. The surrender of said franchise by the Northern Railroad Company was directly involved in the determination by the general term of the question whether the Ogdensburgh and Lake Champlain Railroad Company was entitled to a transfer of the road pursuant to the act of April 8, 1864. That act gave the court full jurisdiction of that question, and of all questions involved in it, and required notice to all persons who had been made parties to any of the decrees theretofore made by the Supreme Court relative to either of the said mortgages. This embraced the Northern Railroad Company, and the record shows that the notices were duly given.

VI. It is averred in the complaint that the defendants, by the false pretense that the Northern Railroad Company was and is an actual legal existing corporation and owner of a railroad, and that it was only necessary for them to be furnished with money to obtain possession thereof, persuaded large numbers of persons who are stockholders of the Northern Railroad Company to pay them large sums of money amounting to \$4000, &c.; and have sold stock of said Northern Railroad Company, and have usurped and used, and still do usurp and use, the franchise

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of being a body politic and corporate, by the name of the Northern Railroad Company, and have held on the 7th March, 1868, a pretended election of directors of such corporation, and have commenced an action in this court against the Ogdensburgh and Lake Champlain Railroad Company and others to obtain possession of said road. These allegations are not denied, but so far as the answer speaks to them they are admitted. The answer avers that on the 7th of March, 1866, the stockholders of the Northern Railroad Company, "said company not having elected directors for several years prior thereto," met at Ogdensburgh and elected thirteen persons duly qualified as directors, &c. The answer also avers that the "Ogdensburgh Railroad Company" was duly and regularly incorporated and organized in December, 1857, under the act of March 31, 1857, and said corporation has never been dissolved, but still exists and is entitled to all the property and privileges given to it by said act and to all the property in the hands of the trustees, if any corporation could be authorized by law to receive such property. And the answer avers the act of April 15, 1858, declaring said "Ogdensburgh Railroad Company" a duly incorporated company. Upon these allegations alone our case is fully maintained on the admissions of the answer. 1. That the Northern Railroad Company, had forfeited its franchise prior to 1857, is abundantly maintained, as before shown. 2. That the legislature could confer the franchise upon another corporation and authorize it to receive the property, is beyond dispute. 3. That they did confer it upon the "Ogdensburgh Railroad Company," in 1857 and 1858, is alleged in the answer, and is unnecessary for us to deny. 4. The Northern Railroad Company had lost the franchise, and it had been conferred upon another corporation. Whether that corporation which received the franchise was the "Ogdensburgh Railroad Company," or the "Ogdensburgh and Lake Champlain Railroad Company," is wholly immaterial

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to this action. The gist of this action is that the defendants did, without lawful warrant or charter, usurp and use the franchise of being a corporation, and that stands admitted in the answer. The statute meets this case squarely. (*Code*, § 441.) "When any defendant, &c. shall be adjudged guilty of usurping, or intruding into, or unlawfully holding or exercising any * * * franchise * * * judgment shall be rendered that the defendant be excluded from such franchise, and also that the plaintiffs recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding \$2000, which fine, when collected, shall be paid into the treasury of the state." In *The People v. Thompson*, (16 *Wend.* 655,) it was decided that to maintain the action is not sufficient to show a mere claim to the franchise by the defendants, but that a user must be shown. See the authorities there cited. Now, we show by the undenied averments of the complaint and the admissions and allegations of the answer a clear case of user of the franchise. In *King v. Ponsonby*, (1 *Vesey Jr.* 1,) it was decided that the king may, at his discretion, seize the franchise of a corporation guilty of an offense amounting to a forfeiture; and for this Lord Ryder, Ch. J. cites *Boggs' case*, (11 *Coke*,) and the case was affirmed by the house of lords. (5 *Brown P. C.* 287.) Bacon says, (*Abridgment, Corporations*, G,) "If the members of a corporation refuse or neglect to choose such officers as they are obliged to choose by their charter this is a forfeiture and consequently a dissolution of the corporation." The note says: "In such case the corporation is dissolved without any legal proceeding, but for a forfeiture it is not dissolved without the judgment of a court of law to enforce it." In *Bradt v. Benedict*, (17 *N. Y. Rep.* 99,) the court say: "As a general rule, to constitute a dissolution of a corporation, by a surrender of its franchise, the surrender must be accepted by the government, or the default must be judicially ascer-

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tained and declared." In *Rex v. Pasmore* (3 Term R. 199, 241,) cited with approval in *Slee v. Bloom*, (5 John. Ch. 366,) it was held that when the integral part of a corporation was gone and the corporation has no power of restoring it or of doing any corporate act, it was so far dissolved that the crown might act and grant a new charter. "It was only for the crown to interfere, without a forfeiture judicially declared, * * the crown might thus grant a new charter, said Mr. Justice Buller, without weighing very nicely whether the corporation could be said to be actually dissolved or only in danger of being so. * * * The corporation is not dissolved until the crown interferes." Kent says, (2 Com. 221,) "The better opinion would seem to be that a corporation aggregate may surrender and in that way dissolve itself; but then the surrender must be accepted by government and be made by some solemn act to render it complete." Here was a surrender by virtue of the 38th section of the statute before quoted, and an acceptance by solemn act, viz. the statutes of 1857 and 1858.

VII. It is worthy of remark that the basis of all the pretended defenses set up in the answer, when stripped of general undefined charges of fraud, too indefinite to be the subject of an issue for trial, is that the board of directors of the Northern Railroad Company, elected in 1854, was an illegal board, were illegal directors and fraudulent directors, the specification being that a majority of the directors were not stockholders; and a copy of the by-laws is annexed to the answer. The first by-law, (page 68,) provides that "There shall be elected by ballot from the stockholders, thirteen directors," &c. But when we refer to the charter of the corporation, (*chapter 324, Session Laws of 1845, page 352, and the Attica and Buffalo charter of 1836, adopted therein*,) we find the stockholders have the right, by the fundamental law, to elect whom they please directors, with only the limitation that there must be one

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resident in each county. That the directors cannot restrict the stockholders in their choice of new directors would seem too obvious for argument. If they can impose any restrictions, they might impose such as would compel the stockholders to re-elect themselves. And the law has, from the earliest time, been very jealous of any attempt of a body of directors to enlarge their own powers or detract from those of the stockholders. In *Angell & Ames on Cor.* (chap. 4, § 2,) it is said, "The corporation at large may, if not inconsistent with the charter, make a by-law creating a select body, to whom they may delegate the power of electing officers and members." "Such a by-law, in order to restrain the right of the commonalty, must be made by common assent, or, in other words, by the commonalty themselves; and if made by a select body, though the power of making by-laws is reposed in them, it is void, for they do not represent the commonalty." (*Angell & Ames*, 283. 2 *Kent's Com.* 369, *n. a*, *marg.* 294, 392, *marg.* 396.) 2. But the answer also refutes the defense, for it shows that those whom it calls illegal directors came in through the power of election and occupied the office. They were, therefore, directors *de facto*, at least, and their acts as binding upon the corporation as though they had been directors *de jure*. (*Angell & Ames on Cor.* ch. 9, § 4.)

VIII. The defendants claim, in their fourth point, that the acceptance by the legislature of the surrender of the franchise could have no effect, because the acts of March, 1857, and April, 1864, were private acts to which the Northern Railroad Company was a stranger. The case cited, (*Catlin v. Jackson*, 8 *John.* 520,) does not appear to have any application here. The Northern Railroad Company was as much a party to the act as any other corporation or person, being expressly named in the act. But it was not necessary that that corporation should be a party to the act. It was a party in doing and suffering these things whereby it surrendered its franchise, and that sur-

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render only awaited the action of the legislature to accept or reject it.

IX. The court has the power to appoint a receiver under the 444th section of the Code, at the time of rendering judgment of dissolution; though the duty is not made imperative upon the attorney general to institute proceedings for that purpose until after the judgment.

By the Court, BOCKES, J. The motion for a stay of proceedings was addressed to the discretion of the court at special term, if not exclusively, certainly to a very great extent. In so far as it was addressed to the discretion of the court, its decision cannot be overhauled on appeal. But the denial of the motion was manifestly right in every possible aspect of the case. In the first place, the parties to the two actions were not the same, nor does it appear that the entire relief demanded and sought for in this action could be awarded in the other.

Again, if it be true (and the court found and adjudged it to be true on an examination of the pleadings) that the material allegations of the complaint were not denied by the answer; that is, that it stood admitted of record that the Northern Railroad Company had forfeited and surrendered its charter and franchise, there was certainly no reason for staying the proceedings in the action; the effect of which would be to prevent the judgment which the law declared should be awarded on a given, admitted or established state of facts. In such case, to permit the company to continue in the use of its corporate rights, by an order staying judgment, would be an arbitrary exercise of judicial authority and favoritism most unbecoming in the court.

We are thus brought to consider the case on the motion for judgment against the defendants on the pleadings.

The complaint charges clearly and unequivocally both a forfeiture and surrender of the corporate rights and fran-

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chises of the corporation known as the Northern Railroad Company; also, a usurpation of right and authority by the individuals named in the judgment, in violation of the statute. It is alleged, in terms, that the corporation was insolvent in October, 1854; that it then surrendered its property to its creditors; that it has remained insolvent ever since; has ever since neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and lawful business; and further, that another corporation, with the same general object, had, under the authority of the state, organized and was in actual operation in its place and stead. Are these averments of fact denied? Indeed is either charge denied? Unless denied by a general or specific denial in the answer of the defendants, they stand uncontroverted, and for the purpose of the action are to be taken as true. (*Code*, §§ 149, 162.)

The answer is stuffed with irrelevant and redundant matter. But in the detailing thereof, the insolvency of the corporation; its surrender of its property to its creditors; its neglect to pay and satisfy its evidences of debt; its suspension of its ordinary and lawful business, and the organization of another company in its stead, under legislative authority, are in substance and effect stated and admitted.

There is no attempt at a specific denial of any allegation of the complaint; and the denial which follows a prolix and confused narrative, in regard to the business affairs of the company, of each and every allegation and averment of the complaint, not before specifically admitted, raises no issue of fact in the case when construed with reference to the prior statements and admissions contained in the answer. It is entirely plain that the defendants did not intend to deny the principal facts charged. It is manifest from their own statement of facts, that they could not truthfully do so. The whole tenor of the answer is to the effect that the corporation had long since become insolvent

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and suspended its ordinary and lawful business. According to their own statement of the case, they could not deny these facts, and all they attempt by the pleading is to excuse the alleged forfeiture. The law, however, admits of no excuse, nor is any explanation available in such case. Without attempting an analysis of the answer, it is sufficient to express our concurrence with the learned judge in his opinion, at special term, that a clear forfeiture of the franchise of this corporation stands admitted of record in this case; and especially do we adopt his conclusion, on the grounds fully stated by him, that the company had for more than a year suspended its ordinary and lawful business. This fact stands admitted by the pleadings beyond peradventure. The judgment of forfeiture awarded at special term is well supported by the admitted facts of the case.

If the views and conclusions above stated are well grounded, there was no issue in the case to be settled or determined by evidence, and it was the right of the party to apply to the court, on the first opportunity, for such judgment as the admitted facts authorized. No trial was necessary beyond an application of the law to the facts. The motion for judgment on the pleadings was therefore right and was properly made at special term.

No point is made by the appellants that the fine imposed by the court was unauthorized or excessive in amount. (*Code*, § 441.) This branch of the case, therefore, requires no comment. The authority to appoint a receiver, I think, exists under section 444 of the Code.

At first view, the right seemed doubtful, but on reflection and examination of the several provisions of law bearing on the subject, I am persuaded that the appointment of a receiver in the judgment of forfeiture is well sustained.

The right to bring an action by the attorney-general for the purpose of vacating or annulling the existence of a cor-

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poration is given by section 430 of the Code. Section 442 provides that in case of forfeiture, judgment shall be rendered excluding the corporation from its corporate rights, privileges and franchises, and that it be dissolved; and section 444 declares that when such judgment shall be rendered, the court shall have power to restrain the corporation and appoint a receiver of its property; and by the last clause it is made the duty of the attorney-general, immediately after the rendition of such judgment, to institute proceedings for that purpose.

The last clause was intended to cover the case when no receiver was appointed in the judgment declaring the forfeiture; but does not create or suggest an objection to the practice of rendering complete and perfect relief in and by the judgment itself. The restraining power is undoubtedly incident to the right to adjudge dissolution; and the appointment of a receiver is absolutely necessary for the purpose of finally closing the affairs of the defunct corporation. Such appointment should therefore form part of the judgment, as in this case, or should immediately follow it. After due appointment the receiver will be controlled in his action by article 3, title 4, chapter 8, of the third part of the Revised Statutes.

The order and judgment appealed from should be affirmed, with costs.

[SCHENECTADY GENERAL TERM, January 5, 1869. *James, Rosekrans, Potter and Beckes*, Justices.]

CAMILLA E. CROSSMAN vs. ALONZO BRADLEY.

In an action to recover damages for an assault upon the plaintiff with intent to commit a rape upon her, the proof to sustain the action must be of the same nature and degree as if the defendant were on trial upon an indictment for an attempt to commit a rape, and the case should be tried upon the same principles. *Per* E. D. SMITH, J.

In such an action, any evidence to repel the allegation of *force*—to show consent, or that no violence was done or designed to the will of the plaintiff—is necessarily admissible, as tending to disprove the very body of the crime.

Every species of evidence showing previous lascivious conduct on the part of the plaintiff, in the presence of the defendant, or in her intercourse with him, designed or adapted to incite or invite him to take liberties with her person, or induce him to believe that such advances on his part would not be unacceptable to her, are clearly admissible, in such an action. JOHNSON, J. dissented.

Evidence of facts tending to prove either that the plaintiff was seeking to induce the defendant to have sexual intercourse with her, or was seeking to entrap him into difficulties arising from an action for an assault, is admissible, within the above rule, as tending to show *consent* on the part of the plaintiff, and that no undesired force or violence was used or attempted upon her person.

But the evidence of particular acts of immodesty on the part of the plaintiff should be limited to those committed with, or in the presence of, the defendant.

THIS is a *civil action* for an assault and battery, alleged in the complaint to have been committed by the defendant upon the plaintiff, with the intent “against her will, to have carnal connection with her, the plaintiff, and by force and violence against her will, to ravish her;” these latter allegations being obviously made with the view of enhancing the amount of damages to be recovered, if any recovery should be had. The answer merely denies the allegations of the complaint.

On the trial, at the circuit, the defendant offered to prove:

1st. That the plaintiff on previous and divers occasions, after coming to the house, had conducted herself lasciviously towards the defendant, and to show particular indecent acts.

2. That three or four days after Mrs. Crossman came

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to the house, one Vincent came there, and staid over night, and that during the evening the plaintiff took indecent liberties with him, and he with her, in the presence of the defendant and others.

3d. That among other things, she sat down facing Vincent, putting her elbow on his knee, and handled and fondled him indecently.

To which testimony, and to each proposition as evidence the plaintiff objected. The court sustained the objection as to each of said propositions severally. To which rulings the defendant excepted.

The defendant offered to prove separately and as separate propositions :

1st. That Vincent staid in the house over night on that occasion, and slept up stairs, and when he was ready to go to bed, Bradley took a light to show him to his room ; that the plaintiff took the light out of his hand, and went up to Vincent's room herself with him, and there remained until the circumstance attracted the notice of the family.

2d. That Bradley having himself gone to bed, got up and went to Vincent's room, and called the plaintiff out and spoke to her about the impropriety of her conduct, saying to her in substance that it was scandalous, and that his family were shocked at it.

3d. That he then went down stairs and again went to bed, and that the plaintiff soon followed and came into his room, and first sat down on the side of his bed, and then lay down by the side of him, and then made indelicate and indecent remarks and demonstrations.

4th. That she afterwards returned to Vincent's room, and there remained the balance of the night.

5th. That from time to time, after she came to the house, she made unchaste approaches and demonstrations to the defendant.

6th. That when the defendant was about to pass through

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the doors of the house it was her habit to meet him in the doorway and rub and push against him.

7th. That she would go down cellar at various times, and call the defendant down after her, and then act unchastely.

8th. That she would go to her own room and call him in after her, and then act unchastely.

9th. That she often, while there, indecently handled the person of the defendant and exposed her own.

10th. That while there, and on a day previous to the last, she directly proposed to the defendant to become his mistress.

To which testimony and each and every item thereof, both separately and collectively, the plaintiff's counsel objected and the court sustained the objection, excluding such testimony and each and every item thereof, separately, to which ruling, and each of them separately, the defendant's counsel then and there duly excepted.

The defendant's counsel again asked that the said testimony might be admitted as affecting the question of damages, to which the plaintiff's counsel objected, and the court excluded the same; to which the defendant's counsel excepted.

The defendant's counsel again asked that the said testimony might be admitted as circumstantial evidence affecting the question of probable guilt of the defendant. To which the plaintiff's counsel objected, and the court sustained the objection, to which ruling the defendant's counsel excepted.

The said testimony was also offered as affecting the relative credibility of parties, and also for showing the intent of the parties, but was also excluded and exception taken as above.

The plaintiff obtained a verdict of \$500 on the trial at the circuit, upon which an order was made that the exceptions taken at the trial, in regard to the admission and

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rejection of evidence, and as to certain points of the charge to the jury, be heard in the first instance, at the general term.

Newton & Ripsom, for the plaintiff. I. The assault and battery proved by the plaintiff was upon a single occasion; the afternoon of the day upon which the plaintiff left the defendant's house. The proof of the plaintiff was *strictly confined to this one time*. The defendant was allowed at great length and in great detail, and without restriction, to prove what occurred on the occasion of the assault and battery. The defendant then offered to prove in a great variety of ways immodest acts of the plaintiff on different days prior to the day when the assault and battery took place. This offered testimony being excluded the defendant excepted.

II. The court was right in the rulings upon these questions. 1st. What had occurred on a prior day or occasion is no excuse or justification of an assault and battery. (*Corning v. Corning*, 2 Seld. 100-104. *Lee v. Woolsey*, 19 John. 319. *Willis v. Forrest*, 2 Duer, 310.) 2d. It would afford no ground for mitigation of damages and cannot be given in evidence for that purpose. (*Id.*) 3d. What the plaintiff did days or weeks before, could not show, or tend to show that the defendant did or did not commit the assault and battery on the occasion proved. 4th. It is not a question of intent that the jury were to decide, but simply whether the defendant committed the assault and battery, and as connected with his acts, whether the plaintiff, *on this occasion*, invited or consented to his acts. It was not even competent for the purpose of showing intent, even if that were material. 5th. It was not competent to show particular acts to effect the credibility of the plaintiff. (*Corning v. Corning*, 2 Seld. 104.) 6th. Though such questions have been allowed in cases where the character of the plaintiff is involved in the nature of the

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action, they have never been allowed in simple actions of assault and battery.

H. R. Selden, for the defendant. I. The right of the plaintiff to recover at all in this case depended upon the question whether the acts of the defendant, disclosed on the trial, were invited, or at least assented to, on the part of the plaintiff. If they were invited or assented to, there was no right of recovery. *Volenti non fit injuria*. (*Broom's Legal Maxims*, 127.) This position was very correctly and clearly presented to the jury by the charge in this case. The verdict of the jury is therefore conclusive upon the question, if no error was committed in the admission or rejection of evidence.

II. We insist that several, if not all of the facts offered to be proved in the propositions numbered one to ten, were admissible as evidence upon the question of legal guilt or innocence of the defendant, and should have been received. 1. The complaint and the testimony clearly show that there was no assault committed by the defendant upon the plaintiff, except in the attempt to have sexual intercourse with her, and such as was the natural, indeed inevitable, consequence of that attempt. 2. If the plaintiff sought and invited such intercourse, then whatever moral dereliction there may have been in the conduct of the plaintiff, there was no legal wrong done to her of which she can complain in a court of justice. 3. It will not probably be denied that if the plaintiff had *expressly* invited that intercourse, and the defendant had at the moment of the invitation, afterwards, and in pursuance of it, done what he did, it would have been competent for him to prove such invitation in his defense. 4. If the act of the defendant followed immediately upon the invitation, very clearly the invitation would be not only admissible, but a complete defense. So if the invitation expressly, or by implication, pointed to a

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future time, it would be admissible as evidence that the act of the defendant was in compliance with it. The evidence of the invitation, therefore, would be admissible, though the act might be in the future, and it would be for the jury to say, in view of all the circumstances, whether the act was in pursuance of the invitation or not. In other words, whether it was an invitation limited to the present occasion, or an invitation with a *continuando*. 5. There is no fact in either criminal or civil trials, not requiring other than oral proof, which may not be established by circumstantial, as well as by direct evidence. (1 *Greenleaf on Ev.* § 13. 1 *Phil. on Ev. C. & H. ed.* 155, 156. 1 *C. & H. Notes*, p. 289, note 298.) Mr. Phillips says, (p. 156,) "A presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades, from the lightest probability to the highest moral certainty. If the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, *it is to be received and left to the consideration of the jury*, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue." Upon this principle, we insist that the facts offered to be proved should have been submitted to the jury, and if proved as offered, we think the jury would not only have been justified in finding the fact of the invitation upon which the defendant relied, but that they could not well have found otherwise. 6. We find no adjudications directly upon this question. For authority, therefore, we must depend upon analogies. The question presented to the jury was one of *intention* on the part of the plaintiff. Did she intend by her conduct to invite the very acts on the part of the defendant which she now com-

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plains of as an assault? That was the question for the jury. If she did so intend, then according to the maxim above quoted, she has nothing to complain of. We can hardly conceive of a case presenting more conclusive circumstantial evidence, of that invitation, than the facts offered to be proved. But it is not necessary for us to maintain *here* that the facts offered to be proved would have been sufficient to maintain the issue on our part; if they had a *tendency* to maintain it, and were in their character competent, it was erroneous to reject them. "The question is not whether the evidence be of more or less *persuasive* force, it is one of *competency*; in other words, whether it be of any force at all." (*The People v. Abbot*, 19 *Wend.* 196.) Upon the question of *intention* as to any particular act, wherever that question arises, in civil or criminal cases, previous acts and declarations of the party whose intention is to be arrived at, are always admissible. Mr. Phillips says: "It may frequently be proper, and in some cases absolutely necessary, to look beyond the transaction which is the immediate subject of inquiry, *into previous transactions*, for the purpose of discovering the knowledge of the parties, their motives or intentions." (1 *Phil. Ev. C. & H. ed.* 172.) The cases are innumerable to which this rule applies; (*See* 1. *C. & H. Notes*, p. 452, note 333; *Id.* p. 465, note 352; *Carey v. Hotailing*, 1 *Hill*, 311, 316,) and the present case appears to us directly within the rule. "Since intention consists in the internal and invisible determination of the mind, its existence must usually be matter of inference, and presumption from external and visible acts and conduct, which serve to indicate more or less forcibly the particular intention. The force of the inference results from the consideration that the intention of a rational agent, corresponds with the means which he employs, and that he *intends that consequence to which his conduct naturally and immediately tends*." (2 *Starkie on Ev.* 739, and note k. 1 *id.* 491, 492.) 7. The rule which applies in criminal trials,

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on indictments for rape, or for assault with intent to commit that offense, applies also in this case, so far, at least, as relates to the prior conduct of the plaintiff *towards this defendant*. (*The People v. Abbot*, 19 *Wend.* 192.) In the criminal cases, evidence of previous intercourse between the prosecutrix and the prisoner is competent, not to excuse the prisoner if guilty of the force alleged, but because such evidence *renders the assent of the prosecutrix probable*, although she testifies to the contrary. So here, the evidence offered of the lascivious conduct of the plaintiff towards the defendant, was such as to render her assent probable, notwithstanding her testimony to the contrary.

Its strength might have satisfied the jury of the fact of her assent; it was therefore competent, and its force was a question for them. 8. It was not necessary for the defendant, in order to make his defense complete, to satisfy the jury that the plaintiff intended to allow the defendant to have sexual intercourse with her. If she designed by her conduct to make him believe that such was her intention, and thus to induce him to make the attempt, and he went no further than she designed he should go, then she is herself responsible for the consequences of her conduct. She has simply *accomplished her obvious purpose*, and the maxim "*volenti non fit injuria*" applies. The evidence offered would certainly tend to prove this; whether it would have proved it or not was a question for the jury.

III. If the evidence as to the plaintiff's immodest behavior, which was rejected, was competent for no other purpose, it was competent in reduction of damages. The plaintiff has alleged the intent to ravish, and attempted to sustain the allegation by proof, with the design of enhancing the damages. It was competent for the defendant to *disprove this allegation if he could*. It is not easy to prove a negative in any case, but it is *possible* to prove it, sometimes by circumstances, and the party who attempts to do so, is entitled to avail himself of all the circumstances that

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have any tendency, however remote, to maintain his side of the issue. Now we insist that the same evidence which would be admissible as tending to disprove the criminal intent, on the trial of an indictment for the same offense, is admissible to disprove the intent charged as matter of aggravation here. That such evidence is competent in the criminal case, has never been disputed. (1 *Roscoe Cr. Ev. 5th Am. from 3d London ed.* 863. *The People v. Abbot*, 19 *Wend.* 192. 2 *East's P. C.* 444.) In an action by a husband for criminal conversation with his wife, a similar rule prevails. "If a woman be suffered to live as a prostitute, with the privity of the husband, and a criminal intercourse with a third party ensue, an action is not maintainable, *it being a damage without an injury.*" "If the husband be himself privy to the criminal intercourse, he cannot maintain this action as *volenti non fit injuria*; and likewise because damages are not recoverable in a court of justice, *grounded on the plaintiff's turpitude.*" (1 *Stephens, N. P.* 9. *Id.* 27. 2 *Starkie on Ev.* 443, 444. *Buller's N. P.* 27.) And if he were living in adultery with another woman, proof of that fact is competent in reduction of damages. (*Smith v. Masten*, 15 *Wend.* 270, and authorities above cited.) For the like reasons, if a father connive at illicit intercourse with his daughter, he cannot maintain an action for her seduction. (*Seagar v. Sligerland*, 2 *Caines*, 219.) Can it be, then, that a woman who invites a man to illicit intercourse, (for the evidence offered certainly tended to prove that,) can recover not only damages of the party invited, for attempting to comply with the invitation, but is entitled to the same measure of damages as if the assault had been made upon her, without misconduct on her part? Unless this question can be answered in the affirmative, the verdict in this action cannot be sustained.

IV. The question of the morality of the defendant's conduct is not involved in this case. If it were so, assuming the facts offered to be proved, as true, (which is the

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aspect in which the case is to be considered here, (4 *Denic*, 396,) the most gross immorality is not on the side of the defendant. Artifice is not confined to the male sex; and if the facts offered to be proved are true, there is good reason to believe that this action is the result of a scheme on the part of the plaintiff to entice the defendant into a position where she could levy black mail upon him.

! E. DARWIN SMITH, J. The basis of this action, as the cause of it is stated in the complaint, is "that the defendant assaulted the plaintiff and attempted, against her will, to have carnal connection with her, and by force and violence, and against her will to ravish her." This in substance and effect is an allegation that the defendant attempted to commit the crime of rape upon the plaintiff, and for this cause, insult and indignity the suit is brought.

The proof to sustain the action obviously must be of the same nature and degree as if the defendant was on trial upon an indictment for an attempt to commit a rape, and the case at the circuit should be tried upon the same principles. If the defendant had been on trial for such offense, on the criminal side of the court, he would have been entitled to impeach the general character of the prosecutrix for chastity and truth by general testimony. (1 *East C. L.* 444. *Roscoe Crim. Ev.* 95, 862.) As with the crime of rape, the gravamen of the offense consists in the *force* used to accomplish the criminal purpose, so it is in the civil action. Any evidence, therefore, to repel the allegation of *force*, to show consent, or that no violence was done or designed to the will of the prosecutrix would be necessarily admissible, as tending to disprove the very body of the crime.

To this end evidence might be given that the prosecutrix had previously had voluntary sexual intercourse with the defendant. (*Rex v. Martin*, 6 *Carr. & Payne*, 544. *The People v. Jackson*, 3 *Parker*, 398. *Same v. Abbot*, 19 *Wend.*

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192. *Rex v. Aspinwall*, 2 *Starkie's Ev.* 700.) The principle upon which such evidence is admissible, is that it is much more improbable, as Judge Cowen says in Abbot's case, "that a common prostitute or the prisoner's concubine would withhold her assent than one less depraved." Such facts are proper for the consideration of the jury on the ground that they furnish evidence of consent, or evidence from which they may imply consent. Within the same principle every species of evidence showing previous lascivious conduct on the part of the plaintiff in this action in the presence of the defendant, or in her intercourse with him, designed or adapted to incite or invite him to take liberties with her person, or to induce him to believe that such advances on his part would not be unacceptable to her, it seems to me, are clearly admissible.

The defendant offered to prove that every advance that was made between them of a lascivious or licentious character was made by the plaintiff. The evidence was objected to and excluded, and the defendant excepted. This offer is stated in general terms, but the objection was not put upon that ground, and the evidence was obviously not excluded because the defendant did not propose to prove particular acts of immodest conduct, but because such evidence was not considered admissible in principle; for the defendant's counsel subsequently made his offers more specific. He made thirteen different offers of evidence tending to the same end—to show lascivious conduct on the part of the plaintiff, and most of them to acts to or with the defendant, or in his presence. Of these thirteen offers or propositions, at least eight of them are to prove the lewd and lascivious conduct of the plaintiff with the defendant, or in his presence.

All of this class of evidence, I think, was admissible within the rule above stated. The facts stated in these offers all tended to prove either that the plaintiff was seeking to induce the defendant to have sexual intercourse

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with her, or was seeking to entrap him into difficulties such as the commencement and pendency of this suit involves. Upon that assumption, if the latter were her purpose, it is none the less fatal to the action than the former. It takes away the idea that force was necessary, or designed or attempted, to have such intercourse. A woman who leads a man into a trap, or uses meretricious arts with such a design, cannot pretend that there was an attempt to ravish her, or that he attempted such ends by force and against her will and utmost resistance. The offense and the cause of action consists in the attempt to accomplish the end implied by *force*. It is absurd to impute such design when the conduct of the woman repels all idea of the occasion or necessity for the use of force. The evidence excluded, I think, was admissible as tending to show consent on the part of the plaintiff, and that no undesired force or violence was used or attempted upon her person, and in this view was a complete defense to the cause of action.

The other exceptions, for the exclusion of evidence tending to show improper conduct between the plaintiff and other persons, stand upon different grounds.

According to the case of *The People v. Abbot*, (*ubi sup.*) these exceptions are well taken; but the case of *The People v. Jackson*, (3 *Parker*, 398,) holds otherwise; which latter case, I think, is generally considered as overruling the case of *Abbot* on this point, and I think asserts the true rule. The evidence of particular acts of immodesty on the part of the plaintiff or prosecutrix in this class of cases should be limited, I think, to those committed with, or in presence of the defendant, upon the principles above stated.

The motion, I think, should be granted, with costs to abide the event.

J. C. SMITH, J. concurred.

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JOHNSON, J. (dissenting.) The action was for an alleged assault and battery. The answer was a general denial. The acts proved were sufficient to constitute an assault and battery, if done without the consent of the plaintiff, and against her will. The defense was that the plaintiff consented to whatever force was used, and invited it by words, acts and conduct, generally. The defendant was a witness in his own behalf, and testified as fully as he desired to in regard to all that took place between them, on the occasion of the alleged assault. The plaintiff was also fully cross-examined by the defendant's counsel, as to what was said and done between them, on the occasion referred to, and also in regard to her relations with other men, and her conduct towards them. The defendant then offered to show, by his own testimony, as independent evidence, that the plaintiff while in his house, on other occasions previous to the day in question, had made various lascivious approaches to him, and been guilty of various acts of a lewd and immodest character, with him, and towards him; and also her conduct with one Vincent, at the defendant's house, at night, on some previous occasion. The evidence was offered on three grounds: 1, in mitigation of damages; 2, as affecting the question in issue, whether the defendant had assaulted the plaintiff; and, 3, as affecting the credibility of each party. The evidence was objected to, and excluded, and the defendant's counsel excepted. The action was tried upon the theory, and the jury were so charged, that if the plaintiff invited the acts complained of and assented to them, and the defendant went no farther than she was willing he should go, and desisted as soon as she objected to his going any farther, the action could not be maintained. Let us see now whether the evidence offered was competent for either of the purposes for which it was offered. 1. It was not competent to mitigate damages. This was distinctly held in *Corning v. Corning*, (2 Seld. 97.) Jewett, J. who delivered

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the opinion of the court, says, at page 104 of the case: "The damages could not be mitigated by evidence that she was dissolute in her conduct. She was entitled to the same measure of damages as she would have been if she had sustained a good character for virtue." One of the judges only, (Foot,) dissented on the ground that the evidence of the character and conduct of the plaintiff were admissible in mitigation of damages. The evidence offered in that case, was of the same character as that offered here, and for the purpose of mitigating damages. So, too, in *Lee v. Woolsey*, (19 *John.* 319,) it was held that insults and slanders, on a previous occasion, could not be given in evidence in mitigation of damages, nor as explanatory of the transaction. If the passion has had time to cool, and there has been time for reflection, the previous conduct cannot be given in evidence for any purpose.

2. Was the evidence competent by way of tending to show that the defendant had been innocent on the occasion of the alleged assault, and had not committed it? Most clearly not. This is a civil and not a criminal action, and the rule of evidence is the same precisely for either party. The evidence had no legitimate tendency to show that the plaintiff invited or encouraged the defendant's acts, on the day in question. She might have invited or encouraged similar acts on other days, and the evidence offered might have proved that fact, but it could raise no legitimate inference that the acts were either invited or encouraged on the day and occasion in question. Suppose, in an action of this character between two men, the defense should be that the assault complained of was in an encounter, in which the plaintiff had challenged the defendant to fight with him, and they had mutually agreed to fight. That, if true, would be a good defense, in the absence of excessive violence. But, suppose further, that the defendant should offer to prove such challenge and agreement, on the occasion in question, by showing that

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the plaintiff had done so on a previous occasion. The evidence would be palpably incompetent; and the same rule must apply here. In each case the fact to be made out is the invitation and consent, and it is perfectly immaterial whether the encounter in regard to which the assent is sought to be established, is of an amatory or a pugnacious character. The consent in the one case must be established by evidence of the same character that would be necessary to establish it in the other. There cannot be one rule where two males are parties, and another where a female is a party against a male. Or take this case upon the other side. Suppose the plaintiff, by way of proving that the defendant had assaulted her on the occasion in question, had offered to prove that he had laid hands upon her on some previous occasion, without her consent and against her will; I think no one will pretend that such evidence would have been competent, by way of establishing the fact, if objected to. Or, still further, suppose the offer had been to show that the defendant had, on other occasions, assaulted other females in the same way, as evidence bearing upon the issue. These illustrations must show, I think, that the evidence was wholly inadmissible upon the issue. The same rule must be "sauce" for the male as well as the female, when they are before the court as parties. There is no rule of evidence by which a fact in issue can be proved, by proving that a similar fact existed on another and different occasion. Such a rule has no place in the common law.

3. Was the evidence proper by way of affecting the credibility of the plaintiff injuriously, or of sustaining that of the defendant? This question is settled against the defendant in *Corning v. Corning*, (*supra.*) Particular instances, or a particular course of conduct, are alike incompetent by way of impeachment. We are referred to the rule in criminal cases, where the guilty intent, is an essential element in making out the offense. It is held, and

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the rule seems to be firmly established, that in indictments for rape, and for an assault with intent to commit a rape, the prosecutrix may be examined as to previous voluntary sexual connection between her and the prisoner, and also that independent evidence may be given of such previous connection, and also that the prosecutrix is a common prostitute. (*The People v. Abbot*, 19 Wend. 192.) I do not propose to question the rule in a criminal case, or to criticise at any length its soundness. But suppose the same evidence should be offered against the accused, that he was in the habit of assaulting other females with intent to ravish, for the purpose not only of proving the assault, but the criminal intent. All men would see its injustice at once and exclaim against it. But this rule has never yet been applied in a civil action for an assault, where the intent is in no respect in issue, and I trust never will be so applied. There is no reason for making such an exception to the general rules of evidence in a civil case merely because a female happens to be a party, and a prejudice whether just or unjust, is sought to be raised, and arrayed against her. The law has no prejudices, and does not yield to vulgar clamor. Whatever may be the character of a female in regard to chastity, she has still rights which men should be compelled to respect. They are not beyond the pale of the law, and do not become the lawful prey of a licentious man, even if they are prostitutes. If in a civil action between a male and female, the licentious life, or particular instances of licentious conduct, may be given in evidence against the female upon any issue in the action, we should allow the same kind of evidence against the male, for the same purpose, or else we poise the scales of justice with unequal and dishonest weights, and mete out justice in partial and unfair measures. Morality, however desirable and praiseworthy, can never be advanced, or upheld, by a perversion of the rules of law for that purpose. Much less

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should we permit it to be assumed, without proof, that any party to an action in court is a person of immoral character.

It is claimed that the evidence was erroneously excluded for the reason that the plaintiff, in her complaint, alleged that the assault and battery complained of was committed with the intent on the part of the plaintiff to ravish. But this is no reason, whatever, for its admission. The intent was not the gravamen of the action in any sense or degree. It was no part of the issue to be tried. It was a mere civil action, and the cause of it did not rest in the intent of the plaintiff at all, as will be seen upon a moment's careful and candid consideration. The very act of battery implies an unlawful intent, and it is not the subject of proof. It is quite immaterial, so far as the cause of action is concerned, what the particular intent was, if the act was not justifiable. In this respect it is like an action for a false and fraudulent warranty upon a sale of property. The action being upon the contract, the scienter alleged, is of no importance, and need not be proved; nor is it, indeed, the proper subject of controversy by way of evidence upon the trial. (*Ross v. Mather*, 47 Barb. 582.) It seems to me very clear that the rule contended for cannot stand and prevail, upon any such distinction. The distinction is a seeming and not a real one, as time and more careful attention will, I think, clearly show. I am of the opinion, therefore, that the evidence was properly excluded, and that a new trial should be denied.

New trial granted.

[MONROE GENERAL TERM, September 7, 1868. E. D. Smith, Johnson and J. C. Smith, Justices.]

KINGSBURY vs. WILLIAMS.

After a guarantor of rent has become fixed and liable for rent in arrear, such liability can only be discharged by payment, release or other satisfaction. It will not be discharged by a surrender by the lessees, of the unexpired term and the possession of the demised premises without the knowledge or consent of the guarantor, upon an agreement that the lessor will release his claim for rent yet to accrue, but that such surrender shall not affect his claim for rent already due. *JOHNSON, J. dissented.*

Such a case is not within the principle which discharges a surety upon the ground of a variation of the contract without his consent; the remedies of the guarantor being in no way impaired or delayed by the surrender.

MOTION for a new trial upon exceptions taken at the circuit, and ordered to be heard in first instance at general term, judgment in meantime suspended.

This is an action by a lessor to recover rent in arrear, from a guarantor or surety in the lease. On the 13th of September, 1855, the plaintiff demised by lease to Thomas Hilliard and Walter Bourne, a "certain village lot with the buildings thereon," situated in the village of Lyons, from the first day of October of that year, "for and during the term of five years then next immediately ensuing, and fully to be complete and ended," for the yearly rent of \$128, payable quarterly on the first days of January, April, July and October. The tenants covenanted to pay such rent. The defendant executed an instrument in writing appended to such lease, bearing even date therewith, under his hand and seal, reciting that he, at the request of said lessees, and in consideration of \$1 to him in hand paid by the lessor, guaranteed the payment of the rent to the lessor, according to the provisions of the lease. The tenants went into possession under such lease, and continued to jointly occupy the premises, until July 1, 1856, when Hilliard purchased his co-tenant's interest, who surrendered possession to him, and he continued as sole tenant in possession until the building was burned on January 1, 1858. Hilliard was in possession at the time of the burn-

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ing, and Bourne was not. The most of the buildings were destroyed. The buildings could not be occupied after January 1, 1858. The plaintiff's agent, the plaintiff being a non-resident of the state, was, within a month after the burning, notified by the tenant that no rent would be paid for the period after January 1, 1858, unless buildings were put thereon. On the 9th day of April, 1860, Hilliard and the plaintiff executed an instrument in writing, under their hands and seals, reciting and referring to the said lease and the release of Bourne to Hilliard, in and by which the plaintiff released all claims for rent to accrue thereafter, and the said Hilliard surrendered to the plaintiff his term and his rights under said lease. It was stated in said agreement that the plaintiff's claim for rent which had already accrued should not in any way be affected by said agreement. At the time of the execution of this agreement, nine quarter-yearly installments of rent had become due upon the lease, and remained unpaid, amounting to \$292.50, and two installments for the unexpired portion of the term were yet to accrue and become due. After the execution of said agreement, the plaintiff conveyed the demised premises to one Cramer, who went into possession and had since remained in possession thereof. The release, conveyance to Cramer and occupation by him were without the knowledge, privity or consent of the defendant. The court decided that the execution of the sealed instrument dated April 10, 1860, with the surrender of the term and possession of the demised premises by Hilliard to the plaintiff, pursuant to such instrument, the conveyance of the demised premises to Cramer, and Cramer's occupation of said premises under said conveyance, without the knowledge or consent thereto by the defendant, amounted to a material alteration of the contract to which the defendants' guaranty related; and the defendant not knowing of or assenting to the alteration, was thereby discharged from his liability

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upon the guaranty, and directed a verdict for the defendant, which was entered.

Wm. Clark, for the plaintiff. I. The guaranty signed by the defendant related to nothing but the payment of rent as it should become due. It had no relation to the term granted to the tenant.

II. As soon as any installment of rent became due and unpaid, an action accrued to the plaintiff to recover the same against the defendant as guarantor.

III. On the 1st day of April, 1860, the whole rent claimed by the plaintiff had become due, and his right of action against the guarantor, as well as the lessees, to recover the same, was perfect.

IV. The plaintiff, on the 1st day of April, 1860, having an unquestionable right of action to recover against the guarantor the accrued rent, that right could not be discharged or taken away except by a release of it, or payment and satisfaction of the rent, or some act by which the lessees were discharged from their liability for it.

V. Neither payment nor release is pretended, nor is it claimed that any agreement was made that the plaintiff's right should in any way be released or discharged, or that any instrument was executed which related to the plaintiff's right of action.

VI. The idea of the judge that the instrument in writing dated April 9, 1860, altered the agreement, the fulfillment of which the defendant guaranteed, is clearly erroneous. 1. Not a word, syllable or letter in the lease was in the least changed, altered, obliterated or added to. 2. The time of payment of the rent was not changed. 3. The instrument was a conveyance back to the lessor of the unexpired portion of the term created by the lease. This did not alter the lease. It was an act based upon the lease, and was an affirmation of it. As well might it be claimed that the deed of one who parts with his title to

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real estate is an alteration of the deed by which he obtained title. The instrument was also a release of the lessee from liability for rent yet to accrue. This did not alter the lease, but by the release of the rent affirmed the existence and validity of the lease. As well might the guarantor of the payment of the installments to become due on a bond claim that a release to the obligor of his liability for the last installments was an alteration of the bond by which he was released from liability for prior installments. As well might the indorser or guarantor of a promissory note claim that releasing the liability of the maker as to one half of the amount of the note, discharged the liability of the indorser or guarantor for the other half.

VII. The guarantor had no interest in, or control over the term, and is not affected by any disposition the lessee might make of it. The lessees might sell the term to whomsoever they please, or convey it without consideration, or abandon the estate in defiance of the guarantor and without affecting his liability for rent. It follows that they might surrender to the landlord any unexpired portion of the term, without affecting the guarantor's liability any further than releasing him from liability for rent so far as they themselves were released.

VIII. The following are cases in which the guarantor would be released: 1. When the time for the payment of the rent was extended by a valid agreement. This would deprive the guarantor of his right to pay the rent, and collect of his principal. 2. When the contract is altered in any material part, by erasure or interlineation. In this case its identity is destroyed; it is not the contract to which the guaranty related. 3. When the contract is annulled and made void by any means. He cannot be discharged from the whole simply by a release of the principal from a portion of his liability, as in the present case.

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IX. Judgment *non obstante veredicto* should be ordered, or otherwise a new trial should be granted.

J. Welling, for the defendant. I. The written agreement between the plaintiff and the tenants, Hilliard, dated April 9, 1860, the evidence that the defendant had no knowledge of the execution of said instrument until after it was executed, and had never assented thereto, and the conveyance by the plaintiff to Cramer of the demised premises; that Cramer went into actual possession under such conveyance, erected buildings thereon, and had ever since been in such possession, with the deed from the plaintiff to Cramer, were each proper evidence. The decision of the court upon the whole evidence, at its close, and the direction to the jury to find a verdict for the defendant, was proper and fully sustained by a uniform line of decisions, and by all the writers. 1. The instrument between the plaintiff and Hilliard, the tenant, bearing date 9th April, 1860, was a surrender by the tenant of the term granted by the lease. If a lessee for life or years, takes a new lease of the same land, and one term is incompatible with the other, as embracing part of the same period, this is a surrender in law of the first lease. And this rule applies, though the second lease be for years, where the first was for life; or although the second lease be for a less number of years than the first. (*Smith on Real and Personal Property, Law Lib. 3d series, marg. p. 531, citing 2 Pres. Shep. T. 301.*) The usual operative words are, "surrender, give or grant, and yield up. But any other words that denote that the remainderman or reversioner is to have the particular estate will suffice. (*Id. marg. p. 563, citing 2 Black. Com. 326. 2 Pres. Shep. T. 306.*) 2. As between private parties, the law is that any alteration in the obligation or contract, in respect of which a person has become surety, without the consent of the latter, extinguishes his obligation and discharges him, (*Burge on*

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Surety, 214; *Theobald*, § 132; *Whitcher v. Hall*, 5 *Barn. & Cres.* 269;) and this result follows, irrespective of the inquiry whether the alteration could work any injury to the surety or not. (*Bangs v. Strong*, 4 *Comst.* 315.) The reason upon which this rule is founded is, that the surety has never made the contract upon which it is sought to charge him. This answer is, if it is sought to charge him upon the altered contract, that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency the answer furnishes a complete defense. (*Per Grover, J. in The People v. Vilas*, 36 *N. Y. Rep.* 460.) Also Hunt, J. in same case at page 471, who says: "Herein the present case differs from the most of the authorities cited, which were cases of contract simply. The altered contract in these cases takes the place of, and entirely ends the original contract; and if the party is not a surety upon the substituted contract, he is upon none, for none other is in existence." "The principle on which the surety is discharged by giving time to the principal is, that it *alters* the contract by which the surety agreed to become liable, and not that this alteration is to his *prejudice*, for though it be *beneficial* to him, the result will be the same." (2 *Meriv.* 277. 8 *Dowl. & R.* 22. *Per N. Hill, arguendo, in Bangs v. Strong*, 4 *Comst.* 317.) Whenever, therefore, he (the guarantor) fairly assumes a liability it may be extinguished by any act or omission of the guarantee which alters the terms of the contract, unless it be with his consent. Nor does it matter that such an alteration be for the benefit of the guarantor, because he has a right to stand upon the very terms of his agreement. (*Story on Cont.* vol. 2, § 870, ed. 1856, citing *Miller v. Stewart*, 9 *Wheat.* 680; *Wright v. Johnson*, 8 *Wend.* 512; *Bathbone v. Warren*, 10 *John.* 587; *Bacon v. Chesney*, 1 *Starkie*, 192; *Bonar v. Macdonald*, 1 *Eng. L. and Eq.* 1.)

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If a new contract is substituted in place of the original contract, or if the original contract is altered in any material point, without the surety's knowledge or consent, so as to constitute a new agreement varying substantially from the former, the surety is not longer bound. (*Addison on Cont.* 2d Am. ed. p. 669; also p. 670.) When the rights and obligations of the parties are thus changed without the consent of the surety, it cannot admit of a doubt that he will be discharged. In contemplation of law it is an injury to the surety, although the court may not be able to see that he has suffered any damage. (*Per Bronson, J. in Bangs v. Strong, in Court of Errors, 7 Hill, 252: See Rees v. Berrington, 2 Vesey, Jr. 542, per Lord Eldon.*) This case and language is cited with approval by the court in *Rathbone v. Warren*, (10 John. 595.)

II. That this action is brought to recover only the installments of rent unpaid at the date of the surrender, April 9, 1860, does not prevent the application of the principles and rules before cited. (*Henderson v. Marvin, 31 Barb. 299, 300. Mill v. Stewart, 9 Wheat. 680.*) In *Bangs v. Strong*, (4 N. Y. Rep. 316,) after a judgment against the principal and the surety, the creditor entered into an agreement with the principal without the knowledge or consent of the surety, binding the creditor to receive in payment land at an appraisal, instead of money; *held*, that the surety, even after judgment, was discharged.

III. The clause in the agreement of April 9, 1860, in these words: "Said Kingsbury is not to be held to have waived any claim he has or may have for rent of said premises which may have accrued or become due at the date hereof," is not valid or operative to preserve the defendant's liability for such rent. The defendant's contract is ancillary to, or dependent upon, the existence of another; when the latter is discharged the former is also, and this in spite of the expressed intention of third parties, i. e. the plaintiff and the tenant, to keep the former in force for

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specified purposes. "Nothing can be better settled, than the doctrine that if an obligation be dependent on another obligation, (and by parity of reasoning, upon the legal existence of another instrument,) and the latter be discharged or become void, the former is also discharged." (*Miller v. Stewart*, 9 *Wheat.* 706.) In *Broom's Legal Maxims*, (edition of 1868, p. 669, *marg.*) in treating of the maxim: "*Modus et conventio vincunt Legem*," the author says: "In the above and similar cases, these as well as in some others relative to the disposition of property, which have been noticed in the preceding chapter, another maxim emphatically applies: "*Fortior et potentior est dispositio legis quam hominis*. For instance, "surrender," is the term applied in law to "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist; as in the case of a lessee taking a second lease from the lessor, or tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent charge from his lessor. In such case the surrender is not the result of *intention*; for if there was no intention to surrender the particular estate, or even if there was an express intention to keep it unsurrendered, the surrender would be the act of the law, and it would prevail in spite of the intention of the parties."

E. DARWIN SMITH, J. The defendant undertook in and by his agreement and guaranty, indorsed upon the lease, that Hilliard & Bourne, the lessees in said lease, should pay the rent reserved in and by said lease to the lessees, according to the terms and provisions of said lease. The rent, by the terms of the lease, was payable quarterly in the sum of thirty-two dollars and fifty cents, on the first days of January, April, July and October, amounting to \$130 in each year. The proofs on the trial show that the said lessees occupied the demised premises under said

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lease and were in arrear for rent for two years and one quarter next prior to April 1, 1860. The lease would have expired on the first day of October, 1860, and the same was put an end to by the surrender of the premises by the lessees and a release of all claim for rent thereafter by the lessor, by the agreement of the 9th day of April, 1860.

At that time the defendant was clearly fixed and liable for the rent in arrear. This liability could only be discharged by payment, release or other satisfaction. It is a settled rule that a right of action for a covenant broken or other legal cause, once created or existing, remains until legally discharged. The decision at the circuit was that the defendant was discharged from his liability for such rent upon his said guaranty, on the ground that the execution of the said instrument of the 9th of April, 1860, with the surrender of the term and possession of the demised premises pursuant to said instrument, without the knowledge or consent of the defendant, amounted to a material alteration of the contract to which the said guaranty relates.

The agreement referred to clearly was not designed to have that effect. As between the parties, the right of the plaintiff to recover for the rent in arrear is expressly retained and reserved in the contract, and if it had not been so reserved the surrender of the term by a lessee does not discharge him for any previous liability for a breach of the covenant of the lease. (2 *Shep. Touch.* 301.)

The defendant is a surety, and his contract confessedly is to be construed strictly, and his liability cannot be extended beyond the clear terms of the agreement, and will be discharged by any acts or omissions of the guarantee, which alter the substance or force of the contract without his consent. (2 *Story on Contracts*, 870. *People v. Vilas*, 33 *N. Y. Rep.* 460.)

Before breach, any material alteration of the contract, it is well settled, will discharge the surety and any other party not consenting to it. The case of *Miller v. Stewart*,

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(9 *Wheaton*, 680,) was a case of this kind, and well illustrates the rule. The defendants became sureties in a bond to the plaintiff for the faithful discharge of his duty by a deputy collector appointed to collect the taxes in eight townships. After the execution of the bond, the name of another town, making the number of townships nine, instead of eight, was inserted in the bond. This was held a material alteration of the bond by which the sureties were discharged. This was an alteration of the contract upon the face of the instrument. The alteration enlarged the liability of the sureties and the bond from the time of the alteration became voidable for that reason, as against the sureties.

There is a class of cases where the creditor did not accept the precise terms of the guaranty in contracting with the principal, or varied the terms of the contract in respect to the mode or times of payment or other risk, in which it has been held the surety was not liable.

The cases of *Henderson v. Marvin*, (31 *Barb.* 299;) *Walrath v. Thomson*, (6 *Hill*, 540;) *S. C.* (2 *Comst.* 185;) *Wright v. Johnson*, (8 *Wend.* 516;) *Birckhead v. Brown*, (5 *Hill*, 634;) and *Dobbin v. Bradley*, (17 *Wend.* 422,) are cases of this kind. In this class of cases the guarantor was never fixed or bound. The terms of the guaranty were never accepted or complied with by the creditor, and the default of the principal debtor was not within the terms of the contract. The case of *Bangs v. Strong*, (7 *Hill*, 250; 10 *Paige*, 11; 4 *Comst.* 317,) presents a case like this in one important particular, that the original liability of the surety was fixed and undoubted. In this case the creditors contracted with the principal debtor, after judgment against the principal and surety, to take lands from such principal debtor in payment of the debt at the valuation of individuals, after deducting ten per cent from the appraisement. This was held such a change of rights of

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the surety as to discharge his liability. Judge Bronson says of it, (7 *Hill*, 254,) "The creditor had agreed to take land instead of money, for the whole or part of the debt."

If the surety had paid the debt and been substituted in the place of the creditor, he would only have acquired the right to receive payment in land. The surety was held discharged from the debt on the ground that his right to subrogation was impaired by the new contract.

In 4 *Comstock*, in the same case in the Court of Appeals, Judge Pratt said: "The true ground upon which the liability of the surety is discharged is that his rights against his principal are impaired or affected." This is the rule, I think, where the surety is clearly fixed and liable, and subsequent acts or agreements between the creditor and principal debtor are alleged to cut off or discharge such liability.

While the contract is executory it is undoubtedly true that any material change or alteration of its terms destroys it and discharges the sureties, and enables him when sued upon the new substituted or altered contract, to say, *non hæc in fœdera venir*. (*Burge on Suretyship*, 214, 218.)

Questions in respect to the liability or discharge of sureties, in consequence of an alteration of the contract, have generally arisen in cases where the contract of the surety was an entire one, and the supposed variation or change of it went to the whole consideration and the whole liability. But in this case the contract of the defendant is divisible. He was liable for each quarter's rent as it fell due, and when the supposed alteration of the contract was made he had become fixed by the non-payment of the rent by the lessees, Hilliard & Bourne, for nine quarters' rent. His contract of guaranty is precisely the same, as I regard it, in legal effect, as if he were an indorser of Hilliard & Bourne upon nine promissory notes of \$32.50 each, payable at the time when the said quarters' rent in arrear respectively fell due, and had been charged as such indorser by due demand and notice of non-payment. If in addi-

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tion to nine such promissory notes, the lessor had taken and held two others of the same amount for the two quarters' rent, payable on the first days of July and October, 1860, would the canceling and giving up to the lessees of such two last mentioned notes, not due and payable on the said 9th day of April, 1860, discharge the defendant from his liability on the said nine over due and protested notes? If it would I agree that the discharge of Hilliard & Bourne from the payment of such rent would have the same effect. But it seems to me that such would not be the effect of the surrender of two such notes. It could not affect the defendant's liability upon the matured and overdue paper. This, in substance and legal effect, is all that the plaintiff has done in this case. He has discharged the lessees and the defendant from the payment of the last two quarters' rent upon the said lease. It is just the same as though he had received payment from Hilliard & Bourne of the last two quarters' rent before they fell due, leaving the previous nine quarters' rent unpaid. Certainly this would not discharge the defendant. There is, in fact, no alteration of the defendant's contract. On the face of the lease and the defendant's guaranty no alteration appears. There is no alteration of the terms of the contract apparent on the face of the instrument. The alleged alteration does not relate to the quarters' rent, or either of them, left unpaid. There is no new contract relating to such rent. Varying the terms of payment is taking away the defendant's right of subrogation in respect to such rent, as was the case with the new contract in *Bangs v. Strong*, (*supra*.) If the plaintiff had made any new contract with the lessees varying the terms of the payment of such rent, extending the time or changing the mode of payment, such new contract would have operated to discharge the defendant within that case and within the well settled rules of law.

This case, it seems to me, is not within the principle which discharges a surety upon the ground of a variation

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of the contract. The defendant's rights to substitution or subrogation are in no respect impaired by the new agreement. It simply operated to discharge him from further liability, and left the rights of the plaintiff unimpaired in respect to the rent in arrear. I think the verdict should be set aside and a new trial granted, with costs to abide the event.

. JAMES C. SMITH, J. The defense which an alteration of the contract by an unauthorized agreement with the principal gives to the surety, depends for its effect, not on an alteration of the relations between the creditor and the surety, but of those which subsist between the latter and the principal. The surety is entitled at any moment after breach by the principal either to come into court to compel the performance of the engagement for which he is responsible, or to fulfill it himself and then have recourse to legal proceedings to obtain an indemnity; and any act by which these rights are impaired or the possibility of resorting to them delayed, places him in a different situation from that to which he originally looked forward, and he is therefore discharged. But an act which has no such effect does not release him from his obligation. (*See 2 Am. Lead. Cas.* 397.)

By the terms of the lease in the present case, the rent was payable in installments, and the claim, in suit, is for rent which accrued and became due and payable before the surrender, and while the tenant was in possession. The surrender of the lease and the release of the tenant from liability for rent for the unexpired portion of the term did not affect the relations of the surety to the principal in respect to the rents previously accrued and then due and payable. The suggestion that he may have relied on the tenant's continuance in possession during the whole term to enable him to pay the rent, is speculative. The surety might have insisted on that condition by an express

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stipulation to that effect, but he did not; and in the absence of such stipulation he must be deemed to have contracted in view of the settled rule of law that a surrender of the term by the lessee, does not discharge him from any previous liability for a breach of the covenants of the lease. I do not perceive how, in any legal view of the case, the remedies of the surety have been impaired or delayed by the surrender.

I am of opinion there should be a new trial.

JOHNSON, J. dissented.

New trial granted.

[MONROE GENERAL TERM, December 7, 1868. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

PIERCE vs. TUTTLE.

To maintain ejectment, the plaintiff must establish that he is the owner of the premises in question, and lawfully entitled to the immediate possession of the same, and that the defendant was, at the time of the commencement of the action, in actual possession of said premises, and unlawfully and wrongfully withholds such possession from the plaintiff. *Per E. D. SMITH, J.* Ejectment is purely a legal action. It is brought to assert and establish a legal title to land, and the right of possession essential to sustain the action must be such as follows the legal title. *Per E. D. SMITH, J.*

An entry under a contract to purchase, is an entry by leave and a license which, while it remains unrevoked, protects such possession, as against an action of ejectment. A vendor cannot eject his own vendee who has entered by license, or under an express agreement giving him such possession, until such license is rescinded, or such agreement broken on the part of the vendee.

But if the vendee is in default in making any of the payments, or in performing any of the conditions or covenants specified in the contract of sale, ejectment may be brought by the vendor, without any notice to quit, or demand of possession.

If the vendor, on the day appointed, offers to perform on his part, and tenders a deed for that purpose, but the vendee does not pay the purchase money, or offer to do so, but refuses to receive the deed, this puts the latter in

53b 155
9ap 24
53b 155
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default; and the legal consequence of such default is, that it revokes the vendee's license to occupy the premises, and makes his occupation, thereafter, wrongful. The vendor may thereupon bring ejectment, without giving any notice to quit.

In ejectment by vendor against vendee, the latter can only defend his possession by showing a performance on his part, or that he is not in default.

It is no defense to such an action that there is a mortgage which is a lien upon the premises, beyond the incumbrances specified in the contract and assumed by the vendee, where there is a balance of purchase money still due, over and above the amount of all the incumbrances. If the vendee is not content to take the title of the land, he should specify his objections and give up the possession. Or, if he is unwilling to give up the possession, and proposes, notwithstanding the mortgage, to affirm the contract and insist on its execution, he should at the time a deed is tendered, and the money demanded, tender all the purchase money, except a sum sufficient to discharge the incumbrances, and specify his objections to the deed, if he has any other.

ACTION to recover the possession of real estate. The plaintiff was the owner of a farm in Genoa, Cayuga county. On the 26th of February, 1867, the parties entered into a written agreement under seal, the plaintiff to sell and convey, and the defendant to purchase and pay for the same. The defendant was to pay \$5200, and assume two mortgages, one "now in possession of Darius Adams, upon which there is due and payable the sum of thirteen hundred dollars, and interest, (*the interest to the first day of April next, to be paid by said party of the first part.*) Also the payment by said party of the second part, of a mortgage of a part of said premises, made to John Weeks, for securing the payment of the sum of five hundred dollars." The plaintiff was to convey by "a good and sufficient warranty deed for conveying and assuring to him, the said O. H. Tuttle, the premises above described, *free from all incumbrances, except the two mortgages above mentioned.*" The money was to be paid, the conveyance given, and the defendant was to take possession on the first of April, 1867. The defendant took possession the first of April, 1867. But the plaintiff was not then ready to make the deed *free from incumbrance*. The performance was

postponed for a day or two, in order to search the records at Auburn. On the second of April the parties went to the clerk's office, and the records were searched by the defendant, and several uncanceled judgments found, and an unsatisfied mortgage to Joseph Munson for \$3000. The parties then agreed to meet on the next Friday, at Northville, where, as the plaintiff testified, he was to bring satisfactions of the judgment. But, as the defendant testified, the plaintiff was also to bring Mr. Munson to take the money on his mortgage. The parties met at Northville on Friday. The plaintiff had satisfactions of the judgment, but Munson did not appear, nor did Pierce have the mortgage; in fact, there was then a suit pending for its foreclosure. The plaintiff then tendered the defendant a deed, and demanded the purchase money. The defendant refused to accept the deed or to pay the purchase money, unless the Munson mortgage was arranged. He refused the deed because it was not according to the contract. The defendant then tendered to the plaintiff a deed for execution, and tendered the purchase money, upon condition that the plaintiff would execute that deed. The plaintiff refused to execute that deed, because he could not, on account of the Munson mortgage. The defendant offered to take the deed with the Munson mortgage, by deducting the amount of the mortgage from the purchase money. But the plaintiff insisted upon litigating the mortgage on the ground of usury.

Shortly after this interview this action was brought; no demand of possession having been made before the suit was brought.

The defense was that the plaintiff had failed to execute and deliver a good and sufficient deed of the premises, free and clear from all incumbrances, except the two mortgages specified in the agreement.

On the trial at the circuit, the evidence being closed,

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the counsel for the defendant moved for a dismissal of the action, on the grounds :

First. The parties made a written contract for the sale and purchase of this farm on the 26th day of February, 1867. The defendant at the time knew nothing of this Munson mortgage. In this written agreement it was provided that he (Tuttle) should pay all the money for this farm upon the first day of April, then next, with the exception of what was due upon two certain mortgages specified in the agreement, one for \$1300, another for \$500. Pierce knew at that time that the Munson mortgage was an incumbrance on the premises, for the mortgage was given by himself, and was for \$3000, payable on the first of October, after this agreement was entered into. There is no reason why he should not fulfill his contract, except his making up his mind to litigate this mortgage. The defendant has always been ready to pay the Munson mortgage, (and to fulfill the agreement on his part.)

Second. The plaintiff cannot recover the possession of the premises from the defendant without first showing a failure on the part of the defendant to fulfill the contract on his part.

But the court denied the motion, and decided that the plaintiff was entitled to recover, to which refusal and decision the counsel for the defendant excepted. And said court charged and instructed the jury as follows : "By the contract between these parties the plaintiff was to give to the defendant an unincumbered title, and this Munson mortgage was an incumbrance that remained thereon. It was clear enough that the purchaser was not willing to pay his money and leave this incumbrance upon the premises. Then they went to negotiate how they could do. They did not agree upon the terms so as to be satisfied. So the defendant does not pay his money on the first of April, but still holds possession of the land. The plaintiff wants to litigate this mortgage on the ground that it is

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usurious. He concludes to litigate it. In the meantime the defendant is in possession of the land. I think this action is properly brought and can be maintained, and I must direct the jury to find a verdict for the plaintiff. They must find what the value on the rents and profits are." To which charge and direction the counsel for the defendant excepted.

The counsel for the defendant then requested said court to charge the jury as follows :

First. That if they find that the defendant was ready and willing on the first day of April, to fulfill the contract on his part to pay the money as provided in and by the contract, then the defendant is entitled to recover. But the court declined and refused so to charge; to which refusal the said counsel for said defendant in due time and form excepted.

The court refused to so charge, because Tuttle testified that Pierce told him that he could not give such a title, and he would not do it.

Second. That if the jury find that the defendant Tuttle had been at all times ready and willing to pay the amount required by the contract upon receiving the deed as required by the contract, then the defendant was entitled to the verdict in his favor. The court refused so to charge said jury, and the counsel for the defendant excepted.

Third. That if the jury find that Pierce has been unable by reason of the non-payment of the Munson mortgage to fulfill the contract on his part, and the defendant has been ready and willing to receive the deed provided for by the contract, and has at all times been ready to fulfill on his part, this is not a sufficient reason to justify the plaintiff in his refusal or neglect to fulfill the contract on his part, and the defendant is entitled to a verdict. The court refused to charge as thus requested, and the counsel for the defendant excepted.

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Fourth. That the defendant was not required in equity to accept any proposition made by the plaintiff in regard to the payment of the Munson mortgage, which required him to allow the contract on the part of the plaintiff to remain unexecuted. But the court refused so to charge; and to such charge and refusal the counsel for the defendant excepted.

The court then further charged and instructed said jury as follows: "If the defendant would not pay his money for the farm with the Munson mortgage on it, then he must give up the farm. He cannot keep the farm without paying for it. *Prima facie*, the plaintiff could not perform his contract, but the defendant could not say that he would keep the money and yet not take such title as the plaintiff could give him, and keep the farm too." And thereupon the said counsel for the defendant excepted to that part of said charge.

Under the said directions, charge and instructions of the court, the jury rendered their verdict as follows: "That the plaintiff is the owner in fee of the premises, and the whole thereof described in the complaint, and is entitled to the immediate possession of said premises, with \$500 for the value of the rents and profits claimed in the complaint."

On motion of the attorney for the defendant, it was ordered that the defendant have sixty days to make and serve a case with exceptions, and that the plaintiff have the same time to serve amendments thereto, and that such case and exceptions be heard in the first instance at the general term, and that all proceedings be stayed in the meantime.

G. O. Rathbun, for the plaintiff. I. The denial of a non-suit was right. 1. That the plaintiff was in default was of no consequence, for the defendant was in full possession of the plaintiff's farm. In 20 *N. Y. Rep.* 184, the

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court says: "The defendant having taken possession, and kept it up to the time of the trial, cannot insist on the plaintiff's failure to tender an unincumbered title. Such failure is no defense." In 28 *N. Y. Rep.* 347, the court say: "For aught that appears, the defendant knew of the defect of title before he took possession, and if so he waived all claim on that ground, by taking possession. (8 *Paige*, 606. 6 *Cowen*, 445.) If this be law, then of course, the defendant was bound, on the Friday, to take the deed offered, and pay, (especially as he had the legal right to pay this same Munson mortgage out of the purchase money, *Atk. on Title*, 565; *Gilb. Eq.* 6; *Hoff.* 37,) or give up possession. And his declaration was a declaration that he would not take any deed whatever, and being in repudiation of the entire contract, should have been attended by an immediate surrender of possession, because he could not repudiate or rescind in part, and affirm in part. At this instant his possession became wrongful, and no demand was necessary. The defendant's possession was wrongful because the defendant's agreement by parol to pay the Munson mortgage was valid, and the defendant's neglect to stand to it prevents his claiming that the plaintiff was bound to strict performance. (6 *N. Y. Rep.* 207. 7 *Cowen*, 48. 41 *Barb.* 226. 19 *id.* 266. *Atk. on Tit.* 565. *Hoff.* 37. 3 *John.* 531. 14 *Wend.* 219. 1 *Barb.* 338. 1 *Wait*, 1080, 1087.) 2. Now, if such is the law, if it was the legal duty of the defendant, under the facts as they existed at the time of this motion for a nonsuit, to either accept the title offered, and pay, or rescind and quit possession; and because he actually did neither, and thus assumed the status of saying, "I've got your farm and mean to keep it, but I don't mean to pay you any thing for it," of course he put himself utterly in the wrong, and we can eject him as we could any other trespasser; especially as he precluded and waived any demand by us, by

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defiantly declaring he would not have the farm any way, and yet persistently keeping it.

II. The denial of the motion to dismiss was right. The statement that the defendant was always ready to pay the Munson mortgage was not accurate, but the reverse. He says that at the hotel on the fourth of April he offered to take the farm with the mortgage on it, if the plaintiff would leave out the \$500 mortgage; and yet he was bound to pay that; and besides, on the 11th of April he required a deed (he says himself) according to the contract, that is, clear of the Munson mortgage. That the defendant did not know of the Munson mortgage on the 26th of February, when the contract was made, was of no consequence, so long as it appears from the defendant himself that he knew of it when he took possession. (28 *N. Y. Rep.* 347.) The second ground of the defendant's motion is unsound for reasons stated in our first point.

III. The reasons and principles stated in the first and second points are a full answer to the exceptions subsequently taken by the defendant to the charge, and refusals to charge.

D. Wright, for the defendant. I. The court erred in refusing to dismiss the action. It had been proved that the plaintiff not only had not performed, but that he always refused to perform his contract. He insisted, not only that the defendant should take the deed, subject to the payment of one year's interest more on the mortgage owned by Mr. Adams, than the agreement provided for, and that he should also in the deed agree to pay the plaintiff annual interest upon the \$500 mortgage, which was not so provided in the agreement; but he also insisted that the defendant should accept the title subject to the Munson mortgage for \$3000. It had also been abundantly proved that the defendant had always been ready, and willing, and able to perform the contract on his part.

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II. The court erred in charging the jury that this action was properly brought and could be maintained. And in refusing to charge as requested, to wit: "If they (the jury) find that the defendant was ready and willing, on the first day of April, to fulfill the contract on his part, to pay the money as provided in and by the contract, then the defendant is entitled to recover."

III. The court also erred in charging and directing the jury to find a verdict for the plaintiff, and in refusing to charge, as requested, "That if the jury find that the defendant Tuttle, has been at all times ready and willing to pay the amount required by the contract, upon receiving the deed as required by the contract, then the defendant is entitled to a verdict in his favor."

IV. The court also erred in charging the jury that "if the defendant would not pay his money for the farm, with the Munson mortgage on it, then he must give up the farm." In plain English, unless he would run the risk of paying \$3000 more for the farm than the agreement called for, the plaintiff might compel him to rescind the bargain he had made.

V. This is a plain case, at law even. The main facts are really undisputed. The defendant was always ready, willing and able to fulfill his agreement strictly and literally. He had taken possession of the farm in good faith, in part execution of the contract. He went into possession rightfully. The plaintiff at the time he entered into the contract, and thereby agreed to give a title free from the incumbrance of this Munson mortgage, (for the title was to be free from all incumbrances, except the two mortgages specified,) knew that this Munson mortgage was an incumbrance, and that it must be removed before he could convey according to this contract. With this knowledge he deliberately executed this contract. Having thus executed it, he was bound to perform it, no matter how onerous it might prove. If he intended to litigate this

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mortgage on the ground of usury, he should have so provided in the agreement. That was a defense which existed when the agreement was made, if ever. If such defense existed, it was then known to the plaintiff, and hence he has not the pretense of newly found matter; in fact, he has not the semblance of any excuse. The defendant was entitled to have the title just as the agreement provided, and was willing to pay all he agreed to give for such a title. The plaintiff refused to give such title, and the defendant refused to accept any other; and because he would not accept such as the plaintiff was willing to give, the court held him to be the wrongdoer. Had the defendant consented to take the title subject to the Munson mortgage, to be litigated by the plaintiff, (for he, the defendant, could not set up the usury;) how long would that litigation have continued? What interest would the plaintiff then have to continue the litigation, and no one else could. Not only this, but the plaintiff also required the defendant to pay one year's interest (\$91) more than the contract called for, to Mr. Adams; and also \$35 a year interest on the \$500 mortgage, which was not on interest at all. The defendant was always ready, willing and able to perform the contract on his part. The plaintiff refused to perform. The deed offered was not in accordance with the contract. Interest on the mortgage held by Mr. Adams was to be paid by the plaintiff to April 1, 1867. By the terms of the deed, as offered, the defendant was to pay the interest from April 1, 1866. By the contract, the defendant was to pay the mortgage to Weeks, for securing the payment of \$500. By the deed, as offered, the title was not only subject to the payment of this mortgage, which was not on interest, but the defendant "covenants and agrees to, and with the said party of the first part, to pay him annually the lawful interest on the amount named as being secured by said mortgage last above described, until said mortgage shall become due." That

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mortgage bears date August 1, 1864, payable in seven years and six months, without interest. Hence it will become payable February 1, 1872. The decision of the court practically made a new contract for the parties, and then punished the defendant for not having already performed it.

Chancellor Kent, in his Commentaries, says: "The entire performance is a condition precedent to the payment of the price, and the courts cannot absolve men from their legal engagements, or make contracts for them." (2 *Kent's Com.* 11th ed. 682, *marginal paging* 508.) See also the following cases: *Wolfe v. Howe*, (20 *N. Y. Rep.* 197.) Sickness and death an excuse in a contract for personal services. (*Harmony v. Bingham*, 12 *id.* 100.) Judge Ruggles, at page 115, says: "It is a well settled rule of law, that where a party, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events; and in such a case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by or within the control of the party." (*Beebe v. Johnson*, 19 *Wend.* 500.) "If a party undertake to do an act, he is bound to perform what he undertook, or pay damages; the difficulty and impossibility of accomplishing the undertaking will not excuse him," &c. (*Id.*) That a notice to quit before action brought, was necessary, see *Jackson v. Rowan*, (9 *John.* 330.)

By the Court, E. DARWIN SMITH, J. To maintain ejectment, the plaintiff must establish that he is the owner of the premises in question and lawfully entitled to the immediate possession of the same, and that the defendant was in fact, at the time of the commencement of the action, in actual possession of said premises and unlawfully and wrongfully withholds such possession from the plaintiff.

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All these facts were clearly proved at the trial, and were undisputed except the last. Ejectment is purely a legal action. It is brought to assert and establish a legal title to land, and the right of possession essential to sustain the action must be such as follows the legal title. The plaintiff in this case having the clear legal title had also the right of possession, although the defendant entered under an executory contract for the purchase by him of the land. Such contract conveyed no title, and conferred no right of possession which could be set up at law against the plaintiff. An entry, however, under such contract, was an entry by leave and a license which, while it remained unrevoked, protected such possession as against an action of ejectment. The plaintiff could not eject his own vendee who had entered by license or under an express agreement giving him such possession, until such license was rescinded or such agreement broken on the part of the defendant. On the 1st of April, 1867, the contract of sale and purchase was to be performed by both parties. The plaintiff was to convey the premises and the defendant to pay the purchase money on that day. Neither party was bound to perform the first act. They were to perform their respective parts simultaneously. Neither party performed or offered to perform on that day, except that the plaintiff let the defendant into possession. But performance was clearly waived on that day, and the time extended till the 4th of April. On that day the plaintiff offered to perform on his part, and tendered a deed for that purpose, but the defendant did not pay the purchase money or offer to do so, but refused to receive such deed.

At this point of time the plaintiff, by his offer to perform, had and did put the defendant in default. The legal consequence of such default was that it revoked the defendant's license to occupy the premises and made his occupation thereafter wrongful.

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The proofs clearly show that the plaintiff, on said 4th day of April, tendered a deed in apparent conformity to the contract, and that the defendant refused to receive the same, without assigning any reason, and did not present any other deed himself or demand any other form of deed; nor did he produce or tender the purchase money, or any part of it, or in any other way offer, then and there, to perform such contract on his part.

Upon these facts the plaintiff, upon the defendant's default acquired, then and there an immediate right of action to recover possession at law, and this right of action was in no way released, divested or discharged before the commencement of this suit. The defendant, thereafter, clearly had no legal defense to the plaintiff's action of ejectment. His license to enter was revoked, and he was not entitled to notice to quit.

It is well settled that ejectment may be brought by a vendor of land against his vendee, in possession under a contract or purchase, and that such vendee is not entitled to notice to quit, or demand of possession, if he is in default in making any of the payments or in performing any of the conditions or covenants specified in the contract of sale. (*Jackson v. Moncrief*, 5 Wend. 26. *Same v. Miller*, 7 Cowen, 747. *Wright v. Moore*, 21 Wend. 230. *Powers v. Ingraham*, 3 Barb. 576.) It follows, from these views, that the defendant's motion for a nonsuit, at the close of the plaintiff's case, was properly denied. As the case then stood, the plaintiff had clearly shown that the defendant was in default in not performing the contract, and also that he had expressly repudiated the same by declaring at the time of such tender of performance by the plaintiff that "he had made up his mind that he could not have the farm nor any thing to do with it."

The case contains various requests to charge, and exceptions to the refusal of the judge to charge as requested and to the charge as made. These requests and the views

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expressed in what purports to be a charge of the circuit judge, indicate the points discussed and considered at the circuit, but otherwise they do not present or raise any question for our decision, for the jury were directed by the judge to render a verdict for the plaintiff, and I should presume did so on the spot and without retiring from the box, or considering the facts of the case upon their own responsibility.

The case states that the counsel of the defendant did in due time and form except to that part of this charge wherein the court charged and directed said jury to find a verdict for the plaintiff. This is a valid exception, and presents the question whether a verdict for the plaintiff was properly directed by the circuit judge upon the case as it stood. Such direction was clearly erroneous if the case should have been given to the jury upon any of the propositions or requests made by the defendant's counsel.

The requests and propositions so submitted all proceed, I think, upon an erroneous assumption in respect to the law of the case, and were all properly denied. The requests ask the judge to charge and instruct the jury that if the defendant, on the first of April and afterwards, was always ready and willing to pay the amount required by the contract, upon receiving the deed as required by the contract, then the defendant was entitled to a verdict. By the terms of the contract the plaintiff was to convey the land subject to the payment of two mortgages, one held by one Adams, on which there was due \$1300 and some interest, and one held by John Weeks for \$500. The defendant was to assume and pay these mortgages, and also pay to the plaintiff \$5200. Subject to these mortgages the plaintiff was to execute and deliver to the defendant a good and sufficient warranty deed for conveying said premises free from all incumbrance. The defendant proved that there was also an incumbrance on said premises of \$3000 to one Munson. As this mortgage was a

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subsisting incumbrance on the premises when the plaintiff tendered a deed and offered to perform said contract, the defendant's counsel insisted at the trial, and such is the argument here, that the defendant was not bound to receive said deed, and was not in default until the plaintiff paid off said Munson mortgage and tendered him a deed in conformity with the contract, which would give him a clear unincumbered title to the land, subject only to the two mortgages mentioned in the contract. And such undoubtedly would have been the rule if the defendant had not taken possession of the land and this action were upon the contract to enforce it at law as an executory contract. In such case a party suing must show a strict performance, or a tender of performance on his part.

But this is not an action upon the contract, but ejectment to recover possession of the land, and the defendant can only defend his possession by showing a performance on his part, or that he is not in default.

Both parties are actors, and when the plaintiff tenders a performance under the contract the defendant could not remain merely passive and retain his possession. If he was not content to take the title offered, he should, as Judge Comstock says, in *Viele v. The Troy and Boston R. R.*, (20 *N. Y. Rep.* 187,) "have specified his objection and given up the possession of the land." Or, if he did not wish to give up the possession of the land, and notwithstanding the incumbrance of the Munson mortgage proposed to affirm the contract and insist on its execution he should, on the said 4th day of April, when the plaintiff tendered him a deed and demanded his money, have tendered all the money, except a sum sufficient to discharge the said Munson mortgage, and specified his objections to the deed if he had any otherwise.

The purchase money was \$5200, and the Munson mortgage \$3000; so the defendant was bound, on the first of April, to pay the plaintiff \$2200 over and above this Mun-

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son mortgage. And when the plaintiff tendered him a deed on the 4th of April he should have tendered this sum of \$2200, and demanded a deed, retaining the \$3000 in his hands till the Munson mortgage was discharged. Instead of this he proposed to keep, and did keep, both the money and the land. The mistake in the requests and argument of the defendant's counsel, at the circuit and here, is that the defendant was not bound to act at all, but might remain passive and continue in possession of the land until the plaintiff performed the contract to the letter. The defendant was clearly in default on and after the 4th of April. He did not perform on that day, or offer to perform. Consequently his license to enter into possession under the contract was in effect legally revoked, and he was in possession without right, and the plaintiff was entitled immediately to bring ejectment.

It follows that none of the requests made to the circuit judge presented views of the law of the case which it was his duty to submit to the jury, and that his direction to the jury to find for the plaintiff was entirely correct upon the whole case. It doubtless is true, upon the whole evidence in the case, that neither party fulfilled the contract in such manner and form and time as to entitle him to maintain upon it an action at law. The remedies of both parties were in equity, so far as related to the affirmation and enforcement of the contract, and the party asking equitable relief would be bound to do equity.

The motion for a new trial should therefore be denied.

[MONROE GENERAL TERM, December 7, 1868. *E. Darwin Smith, Johnson* and *J. C. Smith*, Justices.]

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of Alfred Hess and Avery Z. Kingsley, *vs.* WHIPPLE CLARK, J. DAYTON F. SMITH and WILLIAM LEWIS, commissioners of the town of Lebanon, in the county of Madison, appointed under the act entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," passed April 5, 1866, and the TOWN OF LEBANON and the NEW YORK AND OSWEGO MIDLAND RAILROAD COMPANY.

A statute passed in 1866 authorized certain towns to subscribe for the stock of a railroad company, to such an amount as a majority of the tax paying inhabitants of each town, owning or representing more than one half of the taxable property in said town, as shown by the assessment roll for the year 1865, should fix upon by their assent in writing, or by votes, not exceeding a certain per centage of the assessed valuation of property therein; on condition that such written consent of a majority of the tax payers owning or representing more than one half of the taxable property of said town on the assessment roll for the year 1865, should first be obtained. The written consent of the requisite number of tax payers of one of the towns specified was obtained, for the borrowing on the credit of the town of the sum of \$125,000. But such consent contained the following condition, viz: "This consent is made and signed upon the express condition that said road shall be located and constructed upon a line running through or near the village of E.; thence southerly through the towns of L. and S." A sufficient number of the tax payers of the town in question did not sign an unconditional consent to authorize the commissioners to bond the town and subscribe for stock in said railroad company, pursuant to the statute.

Held that if the condition annexed to the consent so given rendered the same invalid; it was made valid by a subsequent statute, passed in 1868, which declared, in substance, that consents obtained in pursuance of the act of 1866 should be valid and effectual for all purposes for which they were authorized to be given, and should not be invalidated or avoided, or in any manner affected, by reason of certain specified matters "or for any other error, irregularity, omission or defect," provided a majority of the tax payers should have actually signed or executed such consents.

Held, also, that in an action brought in the name of the people, against the commissioners appointed under the act of 1866 to subscribe for the stock of the railroad company therein mentioned, on behalf of a town, to restrain such commissioners from executing or issuing or disposing of any bonds of said town, in payment for stock subscriptions, &c. the railroad company was a necessary party.

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That the action being for an alleged wrong, the railroad company was not a defendant, so as to be bound by the proceedings or judgment therein, by merely being named as a defendant in the summons and pleadings.

Such an action cannot be maintained in the name of the people by their attorney-general *it seems*; the people of the state not being interested in the question whether the taxable inhabitants of a particular town should issue bonds of such town to aid in the construction of a railroad.

Nor is it authorized by sections 429 to 447 of the Code of Procedure.

A PPEAL from an order made by one of the justices of this court on the 3d day of October, 1868, denying the motion of the defendants Clark, Smith and Lewis to vacate an injunction order granted by another justice of this court. The appeal is brought by said Clark, Smith and Lewis.

The injunction restrained said Clark, Smith and Lewis and the town of Lebanon from taking any steps or proceedings whatever towards executing or issuing, or disposing of the bonds, or any part or portion thereof, of the said town of Lebanon, amounting to \$125,000, in payment or satisfaction and discharge of a subscription to the capital stock of the New York and Oswego Midland Railroad Company, made by said Clark, Smith and Lewis, as commissioners, under chapter 398 of the laws of 1866, entitled "An act to facilitate the construction of the New York and Oswego Midland railroad, and to authorize towns to subscribe to the capital stock thereof," (*Laws of 1866, vol. 1, p. 874.*) and the several acts amendatory of said act. The injunction also restrained said commissioners and said town from disposing of said bonds which might have been executed or issued, and from investing any moneys which might have been raised by them by the sale of any of said bonds, in the stock of said company, and from subscribing for or purchasing any of the stock of said company in the corporate name of said town, and from issuing any of said bonds to the company; and the said company was also restrained from selling or disposing of any of said bonds which might have been issued or delivered

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to them by said commissioners, or from delivering any stock for said bonds. The injunction forbade all further proceedings by the defendants, under said acts of the legislature respecting the bonding of said town.

The injunction was granted on the complaint in the action, which was verified by the relators.

The motion to vacate the injunction was made on the complaint, the answer of the said commissioners and affidavits.

The action was brought in the name of the People of the State of New York, upon the relation of Alfred Hess and Avery Z. Kingsley, and by Marshall B. Champlain, their attorney-general. The place of trial stated in the complaint was Madison county.

The appeal was argued by Daniel Pratt, for the attorney-general. A brief on the same side was submitted by Mason & Underhill.

The commissioners were represented by Henry E. Davies and William F. Allen, who made oral arguments. Briefs were submitted on the part of the commissioners by Henry R. Low, and Merrit & Prindle.

By the Court, BALCOM, P. J. The commissioners, Clark, Smith and Lewis, were appointed by the county judge of Madison county, pursuant to section one, of the act of 1866. (*Laws of 1866, vol. 1, p. 874*) The second section of that act authorized the commissioners to borrow, on the faith or credit of the town of Lebanon, such sum of money as a majority of the tax paying inhabitants of said town should fix upon by their assent in writing, not exceeding in amount thirty per cent of the assessed valuation of the real and personal property of said town as shown by the assessment roll for the year 1865, of such town, at a rate of interest not exceeding seven per cent, for a term not exceeding thirty years, and to execute bonds therefor under their hands and seals. But the commissioners were for-

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bidden by the same section to issue such bonds unless consent should first be obtained, in writing, of a majority of the tax payers of said town owning or representing more than one half of the taxable property of said town, assessed and appearing upon the assessment roll of the year 1865.

The written consent of the requisite number of the tax payers of said town was obtained for said commissioners to borrow on the faith or credit of said town, as aforesaid, the sum of \$125,000.

By section three of said act the commissioners were authorized to dispose of said bonds and invest the proceeds in the stock of the New York and Oswego Midland Railroad Company; and subscribe for such stock; and such stock, when scrip therefor should be issued, would belong to said town; and *such town* would acquire the same rights and privileges as other stockholders of said company.

This action would not have been brought if the aforesaid consent, of a considerable portion of the tax payers of said town, had not contained the following condition, viz: "This consent is made and signed upon the express condition that said road (meaning the New York and Oswego Midland Railroad) shall be located and constructed upon a line running through or near the village of Eaton; thence southerly through the towns of Lebanon and Smyrna." A sufficient number of the tax payers of Lebanon did not sign an unconditional consent to authorize the commissioners to bond said town and subscribe for stock in said railroad company, pursuant to the act of 1866. (*Supra.*)

It is claimed by the plaintiffs' counsel that the above mentioned condition made the consent of the tax payers of the town of Lebanon invalid, and that no bonds of said town could be legally issued upon such consent.

Several objections are raised by the defendants' coun-

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sel touching the right of the plaintiffs to maintain the action; and they insist that the consent of the tax payers of the town was valid, notwithstanding the condition complained of.

The road was located in accordance with said condition.

It is alleged in the complaint that the commissioners of the town of Lebanon have executed and issued, and were executing and issuing, \$25,000 or more of the bonds of said town, and have delivered or were about to deliver the same to the said New York and Oswego Midland Railroad Company, or to the president or directors thereof, and to take in exchange therefor the stock of said company, or to otherwise dispose of the same. And that the bonds and such of them as have been so delivered are still in the hands of said company, its president, directors or some officer or agent of said company.

It does not appear by the appeal papers that the summons in the action has been served on said railroad company, or that such company has appeared in the action. That such company has not been brought in as a defendant is conceded in the brief of Mason & Underhill, on the part of the plaintiffs, and also in the brief of Merritt & Prindle, on the part of the commissioners. The action being for an alleged wrong, said railroad company is not a defendant, so as to be bound by the proceedings or judgment in the action, by merely being named as a defendant in the summons and pleadings. (*See Robinson v. Frost*, 14 Barb. 536; *Horton v. Payne*, 27 How. Pr. 374.) The company has such interest in the controversy that it is a necessary party defendant to the action. (*See Code*, § 122; *Shaver v. Brainard*, 29 Barb. 25.)

The defendants' counsel insist that the action cannot be maintained in the name of the people by their attorney-general.

It is provided by the Revised Statutes that "it shall be the duty of the attorney-general to prosecute and defend

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all actions in the event of which the people of this state shall be interested." (1 *R. S.* p. 487, § 1, 5th ed.)

Judge Davis, in delivering the opinion of the Court of Appeals, in *The People v. Booth*, (32 *N. Y. Rep.* 397,) said: "The people of the state, like all other parties to actions, must show an interest in the subject matter of, the litigation, to entitle them to prosecute a suit, and demand relief."

The remedy to prevent the erection of a purpresture and nuisance, in a bay or navigable river, is by injunction at the suit of the people by their attorney-general. For all the people of the state are interested in the question, and have the right to use all bays and navigable rivers within the state. (See *People v. Vanderbilt*, 26 *N. Y. Rep.* 287; *S. C.* 28 *id.* 396.) And I think the attorney-general may maintain an action in the name of the people of the state to prevent the obstruction of a public highway, which all the people have the right to travel, because all of them have an interest in such highways. (See *Davis v. The Mayor*, &c. 4 *Kern.* 506.)

All the people of the state are not interested in the question whether the taxable inhabitants of the town of Lebanon shall issue bonds of their town to aid in the construction of the New York and Oswego Midland Railroad. And this action cannot be maintained by them, by their attorney-general, unless it is authorized by the statute, which declares that "upon a civil action being commenced by the attorney-general in the Supreme Court, it shall have power to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business, not allowed by the *charter* of such corporation; and in the same manner to restrain any *individuals* from exercising any corporate rights, privileges or franchises not granted to them by any *law* of this state." (3 *R. S.* 762, § 39, 5th ed.)

Towns are bodies corporate for certain purposes. (1 *R.*

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S. 812, §§ 1, 2, 5th ed.) But they have no *charters* as corporations, within the meaning of the statute above quoted.

It is claimed by the plaintiffs' counsel that the defendants Clark, Smith and Lewis, as commissioners of the town of Lebanon, are exercising *corporate* rights, privileges or franchises not granted to them by any law of this state, by taking measures to issue bonds of the town of Lebanon, and in subscribing for stock for such town in the New York and Oswego Midland Railroad Company, &c. and that therefore the action may be maintained by the attorney-general in the name of the people of the state to restrain such individual commissioners from doing such acts, under the last clause of the statute I have quoted. But for reasons I shall soon state it is unnecessary to decide whether the action is maintainable if Clark, Smith and Lewis, as commissioners, are taking proceedings to bond the town of Lebanon for \$125,000, without the requisite consent of the necessary number of the tax payers of such town obtained in the manner prescribed by the law of 1866. (*Supra.*) But upon this question see *Story's Eq. Plead.* §§ 8, 49; 2 *id.* §§ 921, 923; *Barb. on Parties*, 367; *Attorney-General v. Forbes*, (2 *Mylne & Craig*, 123;) *Same The Mayor, Bailiffs and Burgesses of Liverpool*, (1 *id.* 171;) *Same v. The Corporation of Poole*, (4 *id.* 17;) *Same v. Aspenall*, (*Id.* 513;) *Same v. Wilson*, (9 *Simons*, 30;) *Same v. The Corporation of Norwich*, (16 *id.* 225;) *Same v. The Corporation of Litchfield*, (13 *id.* 547;) *Same v. The Mayor, &c. of Dublin*, (1 *Bligh. N. R.* 312;) 2 *Duer*, 663; 9 *Abbott*, 253; *S. C.* 10 *id.* 144; *S. C.* 19 *id.* 156; 14 *N. Y. Rep.* 506; 23 *id.* 324; 32 *Barb.* 102.

It is not claimed by the plaintiffs' counsel that the action is brought under or pursuant to section 119 of the Code; and it is not alleged in the complaint that the relators therein named have sued for the benefit of all the tax payers of the town of Lebanon.

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It is clear that the action is not authorized by sections 429 to 447 of the Code.

It is argued by the plaintiffs' counsel that the condition annexed to the consent of the tax payers of Lebanon to the bonding of such town rendered such consent invalid. The cases of *The Butternuts and Oxford Turnpike Company v. North*, (1 Hill, 518,) and *Fort Edward and Fort Miller Plank Road Company v. Payne*, (15 N. Y. Rep. 583,) are relied upon to sustain this proposition. The following authorities are supposed to be in conflict with the foregoing cases: *Evansville R. R. Co. v. Dunn*, (17 Ind. R. 603;) *Parker v. Thomas*, (19th id. 213;) *Smith v. Alison*, (23 id. 366;) *Racine County Bank v. Ayres*, (12 Wis. Rep. 512;) *Kenosha, Rockford and Rock Island R. R. v. Marshe*, (17 id. 13;) 1 *Redfield on Railways*, 3d ed. 64; *Id.* 171, § 51; *Central Turnpike Company v. Valentine*, (10 Pick. 142;) *Henderson and Nashville R. R. Co. v. Seawell*, (16 B. Monroe, 358;) *Penobscot and Kenebec R. R. Co. v. Dean*, (39 Maine R. 587;) *Oldtown and Lumber R. R. Co. v. Veasie*, (*Id.* 571;) *Penobscot R. R. Co. v. Denman*, (40 id. 172;) *McMillan v. Maysville and Lexington R. R. Co.*, (15 B. Monroe, 218;) *Wilmington and Raleigh R. R. Co. v. Robison*, (5 Iredell, 391;) *North Missouri R. R. Co. v. Winkler*, (29 Missouri R. 318;) *A. and N. L. Railway Co. v. Smith*, (15 Ohio R. 328;) *Vickburgh, &c. R. R. Co. v. McKean*, (12 La. Annual Rep. 938;) *Conn. and Pass. R. R. Co. v. Baxter*, (32 Vt. R. 805.) But I have not time now to thoroughly examine these authorities; nor is it necessary I should do so, in consequence of the view I have taken of another question in the case which I shall presently consider. For the same reason it is unnecessary to determine whether the complaint is duly verified.

If the condition annexed to the consent of the tax payers of Lebanon rendered the same invalid (a question we do not decide,) I am of the opinion it was made valid by

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chapter 61 of the Laws of 1868. (*Laws of 1868, vol. 1, p. 90.*) It is conceded by the plaintiffs' counsel that the legislature had the power to pass an act to cure any errors there were in the proceedings for bonding the town of Lebanon. But the plaintiffs' counsel insists that the language of the act of 1868, (*supra*,) is not broad enough or sufficiently specific to make the conditional consent of the tax payers of Lebanon, to the bonding of that town, valid and as effectual as it would have been if no condition had been annexed to such consent.

If the condition was unauthorized, it was an error or irregularity to annex it to the consent of the tax payers; and as a sufficient number of the tax payers of Lebanon signed the consent to authorize the bonding of that town, the act of 1868 (*supra*) cured such error or irregularity; for it declares in substance (§ 1) that such consent shall be valid and effectual for all purposes for which it was authorized to be given, and shall not be invalidated, avoided or in any manner affected by certain specified matters, "or for any other error, irregularity, omission or defect." I do not doubt that this language is sufficient to cover and cure the alleged error of annexing the condition to the consent of the tax payers of Lebanon to the bonding of such town.

If it was improper to annex such a condition to the consent of the tax payers, I am unable to see why it was not an error or an irregularity. If it was one or the other it was as perfectly cured as it would have been, provided the legislature had said such consent shall not be invalidated, avoided or in any manner affected by reason of any condition being inserted in or annexed to such consent.

My conclusion, therefore, is that the order denying the defendants' motion to vacate the injunction in the action should be reversed and the injunction order dissolved.

So decided.

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For similar reasons the same decision should be made in *The People on the relation of Peck et al. v. Gardner Morse and others*.

So decided.

[BROOME GENERAL TERM, January 26, 1869. *Balcom, Boardman and Parker, Justices.*]

ALVIN COOK vs. ANNA COOK.

When it is established that insanity existed at a certain time, it is presumed to continue, and the *onus* of proving sanity at a subsequent time is upon the party alleging it, or who seeks to hold the person once insane responsible for his acts.

In an action by a husband, against his wife, for a divorce on the ground of adultery, the defendant, without tendering the issue of lunacy or insanity at the time the adultery was committed, pleaded a record adjudicating her a lunatic, some two or three years before the act of adultery, and the answer was proved by the record, which remained unreversed; *Held* that the fact established by the record could not be contradicted; and as a rule of evidence, the presumption, at the time of trial, was that such lunacy continued, and existed at the time of the adultery. But that presumption could be rebutted by evidence; and the plaintiff was at liberty to prove that the defendant was sane at the time she committed the adultery.

And the referee, although the issue of insanity at the time the adultery was committed was not raised by the pleadings, having received evidence tending to prove sanity prior to, and at the time of, the adultery, and subsequently, and having found that there was no evidence of the existence of insanity at the time of the adultery; and the evidence upon the question of sanity at that time being satisfactory to the court; *Held* that the plaintiff was entitled to a decree for a divorce, on the ground that the evidence showed the defendant sane at the time the adultery was committed.

APPEAL from a judgment on the report and decision of a referee, in an action for divorce on the ground of adultery. The defendant answered, first, denying the allegations of the complaint. The third defense alleges proceedings instituted in 1864, by the plaintiff, in the county court, setting forth the lunacy, &c. of the defendant, the inquiry had, the verdict of the jury, and the judgment

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of the court that the defendant was a lunatic and of unsound mind, and incapable of taking care of herself; that a committee was appointed, &c. Averment that such proceedings were still of force, and a demand of judgment that the complaint be dismissed. The referee found, upon sufficient evidence, that the defendant committed adultery in October, 1867. Also that the allegations set forth in the third answer by way of defense were substantially true, and proved by the record; and further, that there was no evidence of insanity proven to have existed at the time of the adultery. The evidence to prove the third answer was the record of the proceedings resulting in the judgment of lunacy. Evidence was given tending to prove the defendant sane at the time she committed adultery and for some time previous thereto, and so down to the trial. The referee decided that the plaintiff was entitled to judgment dissolving the marriage contract. Exceptions were taken by the defendant.

A. C. Calkins, for the plaintiff.*

A. Thorn, for the defendant.

By the Court, MARVIN, P. J. It will be noticed that the defendant did not tender the issue of lunacy or insanity at the time the adultery was committed. She pleaded a record adjudicating her a lunatic, some two or three years before the act of adultery, and this answer was proved by the record, which remained unreversed.

The counsel for the defendant argues that the plaintiff, upon whose petition the record was made, is concluded by it, and that he could not allege and prove the fact otherwise at the time the adultery was committed; and then argues that insanity is a complete defense. The counsel is right to the extent that the fact established by the record could not be contradicted. The jury found that

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"Anna Cook, at the time of taking this inquisition, is a lunatic and of unsound mind, but does at times enjoy lucid intervals; but so that she is incapable of the government of herself, &c. and that she has been in the same state of lunacy for the space of six months last past, and upwards." This inquisition was found in January, 1865. The judgment followed the inquisition, and it proved the lunacy at the time the inquisition was taken; and as a rule of evidence, the presumption, at the time of trial, was that such lunacy continued, and existed at the time of the adultery. But this presumption could be rebutted by evidence; and the plaintiff was at liberty to prove that the defendant was sane at the time she committed the adultery. (*Jackson v. Van Dusen*, 5 John. 159. *Jackson v. King*, 4 Cowen, 216. *Greenl. Ev.* § 42. *Starkie Ev.* vol. 3, p. 1709. *Hix v. Whittemore*, 4 Metc. 545.) It is unnecessary to multiply authorities. It being established that insanity existed at a certain time, it is presumed to continue, and the *onus* of proving sanity at a subsequent time is upon the party alleging it, or who seeks to hold the person once insane responsible for his act.

In the present case, the issue of insanity, at the time the act complained of was committed, is not raised by the pleadings. It should have been directly presented, and the record of the inquisition could have been used to prove the issue raised by the defendant. The evidence was, however, received by the referee, and also the evidence tending to prove sanity prior to, and at the time of, the adultery, and subsequently. The referee found that there was no evidence of insanity proven to exist at the time of the adultery. If the pleadings had raised the issue of insanity, the referee should, if insanity was a good defense, have found directly whether the defendant was sane or insane. He seems to have supposed that the *onus* was upon the defendant to show, by evidence other than the record, that she was insane. He failed to recollect the

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presumption arising from the fact of prior insanity. In this case the evidence is before us, and it is satisfactory upon the question of sanity at the time the act of adultery was committed. It is not necessary to reverse the judgment. It should be affirmed upon the merits of the case; that is, that the evidence showed the defendant sane at the time she committed adultery, and the question, raised by counsel, whether insanity would constitute a defense, is not in the case, and does not call for consideration.

The judgment should be affirmed.

[ERIE GENERAL TERM, February 8, 1869. *Marvin, Daniels and Lamont, Justices.*]

THOMAS M. FOOTE, executor, &c. vs. SOLON H. LATHROP
and others.

Where a subpoena is issued against husband and wife, service on the husband alone is a good service on both; unless relief is sought against the separate estate of the wife; in which case service should be made upon her.

Where an action is brought against husband and wife to foreclose a mortgage executed by them jointly, and an attorney appears in the action, for both, on the retainer of the husband, and judgment of foreclosure is entered, the wife cannot, after her husband's death, avoid the judgment on the ground that she was not served with process in the action, and did not appear therein.

A PPEAL from an order made at a special term denying a motion to set aside the judgment in this case, as to the defendant Elizabeth S. Lathrop, on the ground that she was not served with any process in the action, and that she did not appear therein.

The petitioner, Mrs. Lathrop, was married to Solon H. Lathrop in July, 1847. In July, 1854, the petitioner and her husband executed a mortgage upon lands belonging to her husband, situate in Buffalo, to Thomas M. Foote as executor, &c. Default in payment was made, and this

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action was instituted, April 14, 1857, to foreclose the mortgage. The petitioner was named a defendant. Judgment was rendered May 12, 1857, and the mortgaged premises were sold June 15, 1857, by the sheriff, to one Henry L. Lansing, for \$8000, the fair cash value. In March, 1862, Grosvenor W. Heacock acquired all the right in the premises which Lansing had acquired, and took, and still has, possession of the premises. The petitioner was not served with any process in the action, nor did she authorize any appearance. Thomas C. Welch, an attorney and counselor of the court, appeared in the action for Mr. Lathrop and the petitioner, upon the retainer of Mr. Lathrop. The petitioner, at the time, was insane, and was confined in an insane asylum, until 1863. No committee was appointed. The petitioner's husband died October 7, 1857, and Welch died in June, 1864.

Heacock, before he purchased the premises, at a public sale made by a referee appointed for that purpose, caused an examination of the title to be made, and it was pronounced good. He paid the fair cash value of the property, and had no knowledge or notice of the condition of the petitioner; nor had he any notice of any claim by her, until a few months prior to this motion.

Burrows, for the petitioner.

Lewis & Gurney, for Heacock.

By the Court, MARVIN, J. The only interest which the petitioner had in the land mortgaged by her husband was an inchoate right of dower. She joined in the mortgage. Her husband is now dead, and she seeks to avoid the judgment on the ground that she was not served with process in the action to foreclose the mortgage, and that she did not authorize an appearance in the action. If the judgment, as to her, is void, the motion must be granted.

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In *Ferguson v. Smith*, (2 *John. Ch.* 139,) Chancellor Kent said: "The general rule is that the service of a subpoena against husband and wife, on the husband alone, is a good service on both; and the reason is, the husband and wife are one person in law, and the husband is bound to answer for both." If the relief is sought out of the separate estate of the wife, service should be made upon her.

In *Leavitt v. Cruger and wife*, (1 *Paige*, 421,) the bill was to foreclose a mortgage executed by the defendants. The husband, only, was served with process. He appeared and answered for himself only. The chancellor decided that the husband was bound to appear and answer jointly for himself and wife, unless he showed a sufficient excuse; that service of subpoena on the wife is only necessary when the proceeding is against her, in respect to her separate estate; in which case the husband was only a nominal party. The separate answer of the husband was ordered off the files of the court as irregular, and it was ordered that the husband enter a joint appearance for himself and wife, or that the bill be taken as confessed.

The same doctrine is reiterated in *Eckerson v. Vollmer*, (11 *How. Pr.* 42.) The interest the wife had in the premises was an inchoate right of dower, and the court said "such interest results from the marital relations, and does not belong to the wife as her separate estate."

The well settled practice seems to have been pursued in this case, and the order of the special term appealed from should be affirmed.

[ERIE GENERAL TERM, February 8, 1869. *Marvin, Daniels and Lamont, Justices.*]

CURTISS and others vs. PRINDERVILLE.

The consignee to sell, of corn then on board a vessel, on selling 10,000 bushels thereof, to G. March 18, 1867, gave a receipt for the price, in which he agreed to store the corn free, and deliver it in store free of all charges (except that he was not to insure it,) until the opening of navigation. On the 10th of April, 1867, the corn being still in the vessel, G. sold to the plaintiffs 2000 bushels thereof and received payment. It was mentioned in the bill of sale "Insurance 7 days," and that the plaintiffs were to "pay insurance after the 18th, \$2000." The corn was at that time insured against loss or damage on board the vessel, to the amount of \$2400, until May 1, 1867. G. on selling, gave an order on the vessel to deliver the corn "free of storage until the opening of canal navigation," which order was accepted by the master. On the 19th of April the corn was, by the direction of the consignee, and without notice to the plaintiffs, transferred to an elevator, where it was destroyed by fire, without any insurance upon it while there. The elevator was a fit and proper place of storage.

- Held* 1. That as to the storing of the corn there was no breach of the agreement; the agreement not specifying where it was to be stored, and it having been stored in a suitable place.
2. That as to the delivery of the corn, the accidental destruction of it by fire was a legal excuse for its non-delivery.
 3. That it was not the duty of the defendant, as owner of the vessel, to notify the plaintiffs of the intended transfer of the corn to the elevator; the custom on that subject not applying to property which has been stored on a vessel through the winter.
 4. That the rights of the parties depended upon the contract, which was to store free, and deliver in store free of charges, and the action being upon the contract it could not be maintained without proving a breach.

MOTION for a new trial, on exceptions ordered to be first heard at a general term.

The action was brought on a contract to deliver, on demand, two thousand bushels of corn; breach, neglect and refusal to deliver.

The bark *Golden West*, and her cargo, some 15,000 bushels of corn, were owned by the defendant; J. N. Comstock was master and S. S. Guthrie consignee to sell. The bark arrived in Buffalo harbor, near the close of navigation on the lakes, in 1866, and wintered in the harbor. March 18, 1867, Guthrie sold to Abraham S. Griffin 10,000 bushels of the corn, mentioned in the receipt of

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the price as "corn on board the bark *Golden West* now lying in Buffalo Creek, which corn I agree to store free, and deliver in store free of all charges (except that I am not to insure it,) until the opening of navigation." This instrument was signed L. S. Guthrie. On the 10th of April Griffin sold to the plaintiffs 2000 bushels of the corn, and received payment. The corn was still in the *Golden West*. It was mentioned in the bill of sale "Insurance 7 days," and "Curtis & Co. pay insurance after the 13th, \$2000." The plaintiffs proved that the corn was insured against loss or damage on board the vessel, to the amount of \$2400, until May 1, 1867.

When Griffin sold, he gave an order directing bark *Golden West* to deliver the corn, "free of storage until the opening of canal navigation." This order was "accepted March 23, 1867, J. N. Comstock, master." The bark was lying in front of the New York and Erie elevator, and on the 19th of April, by the direction of Guthrie, the consignee, the corn was transferred to the elevator. The plaintiffs had no notice of the transfer, and no insurance on the corn in the elevator, and during the night of the 19th of April, the elevator and corn were destroyed by fire. The plaintiffs demanded the corn; it was not delivered, and this action was commenced. Some evidence was given as to the practice or custom to give notice of intention to remove grain from the vessel to the warehouse, and of Guthrie's promise to see that the plaintiffs should have notice, which is sufficiently noticed in the opinion.

The court nonsuited the plaintiffs, and they excepted.

Geo. Wadsworth, for the plaintiffs.

Geo. B. Hibbard, for the defendant.

By the Court, MARVIN, P. J. It is conceded that the title to the corn passed from the defendants to Griffin and

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from Griffin to the plaintiffs, and the question arises upon the agreement entered into by the consignee, Guthrie, "to store (the corn) free, and deliver in store free of all charges (except that I am not to insure it) until the opening of navigation." This agreement was contained in the receipt given for the price of the 10,000 bushels of corn sold to Griffin. The corn, at the time of sale, was in the bark *Golden West*, and this fact is mentioned in the receipt. The plaintiffs, in their complaint, after alleging that they were the owners of the corn, which was in the possession, care and custody of the defendant, allege that the defendant for a good consideration, promised and agreed to deliver the corn to the plaintiffs whenever the same should be demanded of him. A demand and refusal are then averred. Nothing is said, in the complaint, of the agreement to store free, and deliver in store free of charges, and I do not understand it to be claimed that Guthrie became an insurer and was to deliver the corn in any event or be liable for its value. On the contrary, he stipulated that he was not to insure it. I do not understand that there would have been any claim made against Guthrie or the defendant if the corn had been destroyed aboard of the bark. True, the plaintiffs could then have looked to the insurance they had upon the corn. It was proved that the elevator in which the corn was stored was a fit and proper place of storage. The complaint then is that the corn was transferred from the bark to the elevator by direction of Guthrie, without notice to the plaintiffs, and it being destroyed the defendant was unable to store it free and deliver it in store free of charges, until the opening of navigation. In my opinion, as to the storing the corn, there was no breach of the agreement. The agreement does not specify where the corn should be stored, and it was stored in a fit and proper place. As to the delivery of the corn, the destruction of it by fire was a legal excuse for its non-delivery. The plaintiffs were the owners of the corn, and the defendant,

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or Guthrie, occupied the position of bailee, and no charge was to be made for storing and taking care of the corn. If the defendant's duty as bailee of the corn was broken, it seems to me that the complaint should have stated the facts raising the duty, and a breach of such duty. But waiving the question of pleading, was it the duty of the defendant to notify the plaintiffs of the intended transfer of the corn to the elevator? The agreement certainly did not require this. The plaintiffs were permitted to give evidence as to a custom requiring notice when grain is to be put into an elevator; and Griffin stated generally that it was the custom to notify the owners of the grain when the vessel is ready to elevate it. On cross-examination he said he did not know of any case where notice was given that corn would be elevated when it was stored in the vessel through the winter. Deeves, a witness, stated that the consignee or captain gives notice to the owners of a cargo when the vessel arrives, and before it is stored; that considerable grain is kept on vessels during the winter, and put into the warehouses in the spring, as the opening of navigation approaches; that he did not know, of his own knowledge, of a case of giving notice of elevating grain when it was stored on vessels through the winter.

The court decided, as matter of law, that the plaintiffs had given no evidence from which the jury could find a custom of vessel owners or shippers to notify consignees or owners of grain of an intended transfer of grain from the vessel to an elevator or warehouse; and to this the plaintiffs excepted. Perhaps this was not the question raised or intended to be raised. If the evidence tended to prove a custom, it was that the consignee or captain gave the notice. The attention of the court was not called to the distinction. Whatever there may be touching a custom, I am inclined to think it had no application to this case. So far as the evidence tended to prove a custom, it seems that the custom was connected with the arrival

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of the vessel, and when it is ready to deliver it to a warehouse. The owner of the cargo has the right to direct where his property shall be stored, and this is undoubtedly the reason of the practice or custom. But suppose the cargo is consigned to A. to be delivered to B. the owner, and A. should discharge the cargo into a safe and proper warehouse, and then notify B. that his property had arrived, and where he would find it; would this constitute such a breach of duty on the part of the agent as to render him or the ship owner liable for the value of the property, in case it should be destroyed by fire? The custom, whatever it was, did not, I think, embrace this case. It did not apply to property situated as the plaintiffs' property was. It had been stored through the winter in the vessel, and there was no evidence of any custom applicable to such a case. Besides, I think the rights of the parties depended upon the contract (assuming now that the defendant was liable upon the contract made by Guthrie.) The contract was to store free, and deliver into store free of charges. The place of storage was at the option of Guthrie. This was the contract, and it contained no stipulation that notice of an intended change in the place of storage should be given. The action is upon the contract, and without a breach of the contract it cannot be maintained. The only breach was a failure to deliver, and the law excused that, on the ground of a destruction of the property. It may be well to say that Guthrie did inform Griffin, the person to whom he sold the 10,000 bushels of corn, of the intended transfer, but he did not inform the plaintiffs, the vendees of Griffin, of the 2000 bushels.

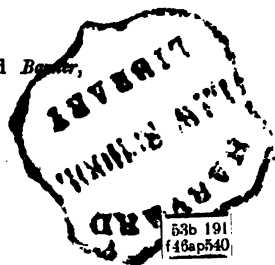
The counsel for the defendant makes the point that the defendant was not liable upon the special agreement made by Guthrie to store the corn free, &c. as the agent had authority only to sell the corn. As I am of the opinion that the nonsuit was right, on the ground I have been considering, I will spend no time with this question.

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There were one or two exceptions taken by the plaintiffs during the progress of the trial, but they were not well founded.

The motion for a new trial must be denied, and the defendant must have judgment.

[ERIE GENERAL TERM, February 8, 1868. *Marvin, Lamont and Beatty*, Justices.]



GIBSON vs. TOBY & BOOTH.

In order to make the receiving of the note of a third person, by a vendor, from the vendee, a payment of the price, there must be an agreement between the parties that such note shall be taken by the vendor in payment for the property sold.

When the sale and delivery of the property and the transfer of the note are at the same time, a *presumption* arises that the parties agreed to an exchange of property; that is, that the vendor should sell and deliver his property for the note to be transferred by the other party; and the agreement being executed, the note is taken at the risk of the party taking it for his property. The fact of a simultaneous exchange is the evidence from which the agreement is *presumed*. But this presumption is not conclusive. The party taking the note may show that it was not the agreement that he should take the note at his own risk, in exchange for his property.

If the debt exists at the time the note or draft of a third person is transferred, an agreement is required that it shall be payment. The *onus* of showing this is upon the debtor. By proving an express agreement that his creditor should take the note of a third person in payment of the debt, he proves an accord, and by adding the proof of the delivery to, and acceptance by, his creditor, he proves the satisfaction.

Where, by an agreement for the sale of hogs, payment of the price was to be made in cash, and the hogs having been weighed, the agent of the purchasers, expressed a desire to ship them at once, saying he had not time to pay them, but a third person would see that the vendor was paid, to which the vendor assented, and such agent thereupon drove the hogs to a railroad cattle yard and shipped them on the cars; *Held* that this was a delivery, and the purchasers became the debtors of the vendor, and were bound to pay the price in cash; unless there was a further agreement between the parties.

And the only subsequent agreement being that an eastern draft should be given to the vendor, by the vendees, as good to him as the money, or better

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than money; *Held* that the delivery to, and acceptance by the vendor, of an eastern draft, drawn by a third person, for the price, which proved to be worthless, was not a payment of the debt.

What will be deemed due diligence on the part of the vendor, in giving notice to the purchasers, of the dishonor of a draft thus taken for the price of the property sold.

APPEAL from a judgment entered on the report and decision of a referee. The action was to recover the balance of the price of hogs sold. The plaintiff resided in Mexico, Wyandotte county, Ohio. One of the defendants resided in New York city, and the other in Chicago, and they had a place of business in each of those cities. On the 1st of November, 1867, between 8 and 10 o'clock A. M. the plaintiff sold to the defendants, in Buffalo, hogs, the price amounting to \$3408.07. The sale was for cash. The hogs were all weighed between 9 and 10 A. M. when Thomas Pienkowskie, the agent of the defendants, expressed a desire to ship the hogs right away, and said he had not time to pay the plaintiff then, but that William Hogle would see that he was paid. The plaintiff assented, and Pienkowskie then drove the hogs to the Erie railroad cattle yard and shipped them on the cars. About an hour after this, the plaintiff saw Hogle and inquired if he was to pay for the hogs, and Hogle said he was, and asked if the plaintiff wanted to use the money then, or would carry it home. The plaintiff told Hogle that he was going directly home and would carry the money with him. Hogle inquired what train, noon or night, and the plaintiff said night train. Hogle said he would see that the plaintiff had it all in time; that currency was rather hard to obtain up town; that if the plaintiff was going home he could get him an eastern draft which would be as good to him as the money; that the banks preferred giving these drafts to currency. The plaintiff said such a draft would answer him as well as the money. Hogle said when he got leisure he would go up to town and get

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the draft for the plaintiff, and bring it to him in time for his leaving. This conversation was at the Erie railroad cattle yards, about three miles from the banks. About an hour after this, the plaintiff met Pienkowskie at the hotel at the New York Central cattle yard, and they mentioned what the hogs came to, and agreed upon the sum, and P. said they would have to go up town to get the money to pay the plaintiff; that if the plaintiff wanted the money he could get the currency; if the plaintiff wanted to carry it home he could get him an eastern draft, which would be just the same to the plaintiff as money, and he would get for the plaintiff just which he chose. The plaintiff said he would full as soon carry a draft as the money, and for safety, rather; and P. said he would go up town and get the draft and bring it in time. Soon after this, P. and Hogle drove up and said they were going to arrange the matter for the plaintiff; and Hogle inquired the initials of his name, saying he would get the draft payable to his order. The plaintiff told him. About 2 o'clock they returned, and told the plaintiff they had him all fixed right now, and P. handed him the odd dollars, and asked the plaintiff if that was right, and the plaintiff said it was; and P. then handed him the draft, and said, "here is the draft for \$3200." The plaintiff took the draft, saying he supposed it was all right; and Hogle said: "Yes, that is all right," and Pienkowskie said, "Yes, it is better than the money; it cost him one eighth to get it." The plaintiff took the draft. When P. and Hogle spoke to him about taking a draft, they did not say whose draft it was to be. The plaintiff did not read the draft. The parties to the draft were strangers to the plaintiff, and he knew nothing of their circumstances. This was on Friday the 1st day of November. The plaintiff took the cars and got home the next day, at 5 o'clock p. m. and called at the bank in his place. It was closed. Mon-

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day morning, at 9.30, he delivered the draft to the bank, with instructions to place it to his credit. The draft was returned from New York, on the 10th, protested on the 6th November, and the plaintiff took it up. The draft was made by the banking house of H. J. Shuttleworth, Buffalo, and was payable to the order of the plaintiff and indorsed by him, and by the cashier of the bank of Tiffin, for collection. The banker, Shuttleworth, suspended payment November 4, in the forenoon, in Buffalo and New York. He did no business on that day. He telegraphed to New York on the morning of the 4th to pay none of his drafts. His drafts, to the close of business, on Saturday, were paid. A mail was made up in Buffalo at one o'clock p. m. which arrived in New York at 7.30 the next morning. Another mail was made up at 4 p. m. that would arrive at New York at one o'clock p. m.

On the 15th of November, the plaintiff presented the draft in Buffalo to Pienkowskie, and asked him to pay \$3200 for it. P. said he could not do it. The plaintiff learned, at the time he sold the hogs, where the defendants lived. On the 5th day of December the draft was offered to one of the defendants and its amount demanded. He refused to pay, and thereupon this action was commenced.

Upon the motion of the defendants, the referee nonsuited the plaintiff.

The referee decided, as matter of law, that the delivery to, and acceptance by, the plaintiff of the draft was a payment. Second, if not a payment, that the defendants were discharged by the laches of the plaintiff, in giving notice to the defendants of the dishonor of the draft.

Parker & Chamberlain, for the plaintiff.

George B. Hibbard, for the defendants.

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By the Court, MARVIN, P. J. The facts being ascertained, I do not understand that there is any dispute touching the law applicable to cases of the sale of property and the receiving of the note of a third person by the vendor, from the vendee. If the agreement expressly is that the note of a third person shall be taken for the property sold, and the property and note are delivered, the transaction is an exchange of property. It was said by the court, in *Johnson v. Weed*, (9 *John.* 310,) "that the books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterwards turns out to be of no value."

In *Whitbeck v. Van Ness*, (11 *John.* 409, 410,) the court say that the opinion went further than the judges meant to go. Spencer, J. examines a large number of cases, and among them *Ward v. Evans*, (2 *Ld. Raym.* 928,) which he approves. In that case there was a precedent debt, and a note of a third person had been taken. Lord Holt said, "that taking a note for goods sold is a payment, because it was a part of the original contract; but paper is no payment when there is a precedent debt. For when such a note is given in payment, it is always intended to be taken under the condition, to be payment if the money be paid thereon in convenient time." As I understand, there must be an agreement between the parties that the note of the third person shall be taken by the vendor in payment for the property sold. When the sale and delivery of the property and the transfer of the note are at the same time, a *presumption* arises that the parties agreed to an exchange of property; that is, that the vendor should sell and deliver his property for the note to be transferred by the other party, called the vendee, and the agreement being executed, the note is taken at the risk of the party taking it for his property. The fact of a simultaneous exchange is the evidence from which the agreement is *presumed*. This presumption is not conclusive. The party taking

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the note may show that it was not the agreement that he should take the note at his own risk, in exchange for his property. In *Whitbeck v. Van Ness*, (*supra*,) the lease and the note were delivered at the same time, and in addition it was proved that the defendant offered to buy the lease if the plaintiff would take the note, and the plaintiff accepted the offer, and the exchange was made.

In case the debt existed at the time the note is transferred, an agreement is required that it shall be payment. The *onus* of showing this is, of course, upon the debtor. He owed the debt, and must show it satisfied. By proving an express agreement that his creditor should take the note of a third person in payment of the debt, he proves an accord, and by adding the proof of the delivery to, and acceptance by, his creditor, he proves the satisfaction. (*See Noel v. Murray*, 3 *Kern*. 168.)

The question in the present case is, was the relation of debtor and creditor established between the parties prior to the negotiations touching the draft, and did such relation exist at the time the draft was taken? If this question was answered in the affirmative, then the question will be, was there an express agreement that the draft should be taken in payment of the debt. The referee must have found the first question in the negative, or the second question in the affirmative. He does not find the fact directly, but "decided as matter of law that the delivery to and acceptance by the plaintiff of said draft was a payment." As the referee nonsuited the plaintiff he must have been of the opinion that the evidence did not tend to prove a prior indebtedness, or that it proved an express agreement to take the draft in payment. I think the learned referee erred. It seems to me that the evidence clearly showed the relation of debtor and creditor prior to any negotiation touching the draft. By the agreement of sale, payment was to be made in cash. The hogs were weighed between 9 and 10 o'clock. The agent of the de-

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defendants expressed a desire to ship the hogs right away, saying he had not time to pay then, but Hogle would see that the plaintiff was paid, and the plaintiff assented, and the agent drove the hogs to the Erie railroad cattle yard and shipped them on board the cars. This was a delivery. The defendants became debtors, and the plaintiff could have maintained an action against them for the price of the hogs. The plaintiff had a right to insist upon payment in cash. It may be that he also had the right to repossess himself of the hogs if the cash was not paid, as no credit was to be given; but he was not bound to adopt that remedy. The delivery had been made, and the defendants were his debtors. The debt must be paid in cash, unless there should be a further agreement between the parties. A further agreement was made, and the question now is, was it an express agreement that the draft in question should be taken by the plaintiff in satisfaction of the debt?

It seems to me that the evidence did not show that such was the character of the agreement. The *onus* was upon the defendants. Let us again examine this evidence. Starting with the position that the plaintiff was the creditor of the defendants, the defendants, by their agent, approach him, and learn that he is going directly home, and intends taking the money with him. He was then told that currency was rather hard to obtain; that an eastern draft could be got that would be as good to the plaintiff as the money; that the banks preferred giving drafts to giving currency. The plaintiff assented to the taking of a draft.

There was a subsequent conversation with Pienkowskie, in which P. proposed to get currency or a draft, as the plaintiff should choose; saying, if the plaintiff wanted to carry it home he could get the plaintiff an eastern draft which would be just the same to the plaintiff as money. The plaintiff remarked that he would full as soon carry a draft as the money, and for safety, rather. When the

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draft was handed to the plaintiff by Pienkowskie, the latter said "here is the draft for \$3200." The plaintiff took it, saying he supposed it was all right; and Hogle said, "Yes, it is better than the money; it cost me one eighth to get it." The plaintiff took the draft without reading it. Nothing had been said as to whose draft was to be obtained. It seems to me that this evidence does not prove that the plaintiff entered into an agreement with the defendants to take the draft in question at his own risk, in payment of the debt then due him. On the contrary, if it proved any agreement, other than that which the law would imply, viz. in the language of Holt, Ch. J. that "it is always intended to be taken under the condition, to be payment if the money be paid thereon in convenient time," it proved an agreement that an eastern draft should be given to the plaintiff, as good to him as the money, or better than money. No other kind of draft was talked of. The plaintiff exercised no judgment touching the goodness of the paper, and legally he was not bound to do so. The defendants owed him and were bound to pay him, and they handed him a draft declaring that it was better than money. (*See Torry v. Hadley*, 27 Barb. 192.) I think the referee erred in deciding that the delivery to, and acceptance by the plaintiff of the draft was a payment.

If the debt was not paid by the draft, were the defendants discharged by the laches of the plaintiff in giving notice to the defendants of the dishonor of the draft? No point is made that there was any negligence in sending the draft forward and presenting it to the drawees for payment. It was understood that the plaintiff was to take the draft with him, to his home in Ohio. Due diligence was used in sending the draft to the drawees. (*Stevens v. McNeill*, 26 Barb. 651.) What duty did the plaintiff owe to his debtors? Their names were not upon the paper. The paper was presented for payment, which was refused, and notice was given to the indorsers, and I infer to the

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drawer, though this does not very clearly appear in the case. The drawer, however, can raise no objection, as he had directed the drawees not to pay any more of his drafts, prior to the presentation of this draft. The sole point is that the plaintiff was guilty of laches in not notifying the defendants of the dishonor of the bill. Upon this point, the counsel for the defendants cites *Dayton v. Trull*, (23 Wend. 345,) and *Woodcock v. Bennet*, (1 Cowen, 711.) These cases are not in point. The holders of the bills neglected to present them for payment, and the persons from whom they were received were the drawers. There were some other circumstances. In one of the cases, BRONSON, J. says the drafts should at least have been produced and canceled on the trial, or it should have been shown what had become of them.

In the present case the plaintiff did, some five days after he received notice of the dishonor of the drafts, go to Buffalo and then tender to Pienkowskie the draft, and ask him to pay its amount. This was November 15. On the 5th of December the money was demanded of the defendants and the drafts offered to him with the notarial certificate of protest. The action was thereupon commenced. This is not a case where the party has made the paper his own by negligence.

The learned referee erred, and the judgment should be reversed, and there should be a new trial; costs to abide the event.

[ERIE GENERAL TERM, February 8, 1869. *Marvin, Lamont and Barker* Justices.]

JESSIE THOMAS *vs.* GEORGE TRUSCOTT.

Parol evidence is not admissible to contradict or vary written contracts, or their legal effect.

If it becomes necessary to ascertain the subject matter to which a contract relates, and the circumstances connected therewith, for the purpose of understanding the contract, such subject matter or circumstances may be proved by parol, and such evidence is not in conflict with the rule touching parol evidence to contradict or vary written instruments.

Where the plaintiff executed a mortgage on her property, for the benefit of, and as surety for, the maker and indorser of promissory notes, and on a foreclosure of the mortgage, the indorser became the purchaser of the premises; *Held* that the plaintiff was entitled to a release and conveyance from the purchaser, of the legal title which he acquired on the foreclosure sale, upon the repayment to him of the amount of taxes and interest he had paid. Prior to the execution of a mortgage by the plaintiff, the mortgagee held certain notes made by B. and indorsed by C. past due, upon which C.'s liability had become absolutely fixed. He and B. both desired an extension of the time of payment, and negotiated therefor. The creditor consented to grant an extension and to take new notes signed and indorsed as before, on condition that further security should be given. The plaintiff thereupon, at the request of B. gave a mortgage on her property, the condition of which was that B. should pay such notes, to which the mortgage was expressly declared to be collateral; *Held* that by this instrument the plaintiff pledged her lands as security for the debt owing to the mortgagee, and for which both B. and C. were liable; and that the referee correctly found and decided that the plaintiff made and executed the same for the benefit of, and as surety for, both B. and C. as collateral security to the notes as made and indorsed. *Held, also*, that evidence that B. informed the plaintiff of the facts, applied to her to give the mortgage, expressing the opinion that there was no danger of her losing her property; that he thought he and C. would be able to pay the notes; and telling her how the notes were to be made, &c. was not improper; it not going to contradict or vary the terms or legal effect of the mortgage, as properly construed in the light of conceded and surrounding circumstances.

A PPEAL from a judgment entered upon the direction of a referee.

On the 1st of October, 1857, The People's Exchange Bank of Wakefield, Rhode Island, held two negotiable promissory notes of \$4000 each, made by Edwin Thomas, the husband of the plaintiff, and indorsed by the defendant, the brother of the plaintiff, for the accommodation

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of the maker. These notes were past due, and the indorser had been duly charged. The referee found that Thomas and Truscott were then unable to take up the paper without inconvenience, and desired further time for payment, and they negotiated with the bank for such time, upon giving collateral security, which resulted in an agreement between Thomas and Truscott and the bank, that the notes should be renewed by substituting other notes, and that the bank should take as collateral a mortgage of the plaintiff, upon the premises in question in this action. The referee found that Thomas applied to the plaintiff and stated to her the substance of the arrangement with the bank to procure the extension of the debt; and stated to her that if she would consent to the making of the mortgage, he thought there would be no danger of her losing the property; that he thought he and the defendant would be able to pay the new paper when it became due, and that thereupon the plaintiff consented to execute, and did execute, to the bank the mortgage, her husband uniting in its execution. That before the execution of the mortgage, Thomas communicated to the defendant the plaintiff's consent to execute the mortgage, and the defendant assented to it.

Facts not disputed. There was paid on the new notes \$2000; the residue was unpaid, and the defendant was charged as indorser, and the bank foreclosed the mortgage, and in August, 1860, the mortgaged premises were sold to the defendant, for a sum much less than the amount owing to the bank. The defendant then gave new notes, and mortgaged the premises as collateral security, and subsequently paid these notes, and the bank satisfied and discharged the mortgage.

The referee found and decided that the plaintiff made the mortgage to the bank for the benefit and as surety for both Thomas and the defendant, as a collateral security to notes. The evidence bearing upon this question was derived mainly from Thomas and the mortgage itself. The

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objection that Thomas was not a competent witness for the plaintiff, his wife, was overruled, and the defendant excepted.

Thomas, as a witness, stated that he was not able to pay the \$4000 notes when they became due, and that the defendant told him he was not able to pay, speaking of paper generally; that the defendant could not conveniently pay; that there was a negotiation with the bank, through its agents in Buffalo, to get an extension on the notes by giving further security; that the negotiation was conducted by the defendant and himself; that the witness did the principal part of it, consulting from time to time with Truscott. The arrangement was made with the agents to give new notes and for the mortgage as security. That Truscott was cognizant of the arrangement before it was consummated.

The defendant objected to any statement by the witness as to negotiations between the witness and the plaintiff, in reference to her executing the mortgage, on the ground that any answer given would tend to contradict the mortgage and other papers, and would also tend to show an agreement between husband and wife. The objection was overruled, and the defendant excepted. The witness proceeded: he represented to the plaintiff the difficulties her brother and himself were placed in, in consequence of the debt to the bank; that they could get an extension by putting in other security—a mortgage, for instance; the witness spoke to her about giving the mortgage, and told her that that would answer the purpose; told her he did not think there was any danger of her losing the property; that he thought they would be able to pay the paper; told her they could have an extension of time, his own notes to be given, indorsed by her brother, the same as before, if they could give the mortgage as security to the note; that this was the substance of what took place between the plaintiff and himself.

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After he knew that the plaintiff would consent to execute the mortgage, he told the defendant of it, and the defendant assented to it, and expressed his satisfaction with the arrangement. The notes were made, indorsed and delivered, and the mortgage executed, in pursuance of the arrangement, and the old notes were taken up.

The mortgage was read in evidence by the plaintiff. It is in the usual form to the proviso, "And these presents are upon the express condition that if the said Edwin Thomas, his heirs, executors or administrators, shall and do well and truly pay or cause to be paid to the party of the second part, &c. eight promissory notes made by Thomas and indorsed by Truscott, (describing the notes,) and to which these presents are a collateral security, then these presents to cease, &c.; but in case of the non-payment of the notes," &c. The witness Thomas further stated, on his cross-examination, that at the time the extension was obtained, the defendant was liable for him on other paper, as accommodation indorser.

The referee found the fact as above stated, viz. that the plaintiff executed the mortgage "for the benefit and as surety for both said Thomas and the defendant, and as collateral security to the notes described in the condition of the mortgage." And he decided that the plaintiff was entitled to a release and conveyance from the defendant of the legal title which he acquired at the sheriff's sale, upon the repayment to him of the amount of taxes he had paid, and the interest; and judgment was entered accordingly. The defendant filed many exceptions.

Sprague & Fillmore, for the plaintiff.

Geo. B. Hibbard, for the defendant.

By the Court, MARVIN, P. J. If the plaintiff executed the mortgage in question for the benefit of, and as surety

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for, both Thomas and the defendant, the maker and indorser of the notes, then the judgment is right, and it must be affirmed, unless an exception to the admission of evidence was well taken.

The position of the defendant's counsel is that the plaintiff became surety for Edwin Thomas solely; or that she became co-surety with Truscott, for Thomas. Thomas was a competent witness for his wife, the plaintiff.

Was it error to receive the evidence of Thomas, as to what passed between him and the plaintiff touching the giving of the mortgage?

Parol evidence is not admissible to contradict or vary written contracts, or their legal effect. (*Norton v. Coons*, 2 Seld. 33. *Barry v. Ransom*, 2 Kern. 462.) This rule as to legal effect is fully recognized in the latter case, but it was held not applicable to a case arising between sureties. It was held that the rule was limited to the stipulations between the parties actually contracting with each other by the written instrument. That although, in the absence of evidence, all persons becoming sureties for a common principal are held to be liable to contribution, still, one of the sureties may prove, by parol, that another surety promised to indemnify him from loss; that such evidence does not contradict or vary the terms or legal effect of the written obligation. These cases are referred to by counsel, but I doubt whether they are applicable to the question we are considering. If it had expressly appeared from the mortgage that the plaintiff became surety for Thomas alone, I do not think the written contract could be contradicted or varied by proving that she, in fact, became surety for Thomas and Truscott. Such evidence would not be admissible. Construction is given to written instruments in reference to the subject of the contract, and in the light of surrounding circumstances. If it becomes necessary to ascertain the subject matter to which the contract relates, and the circumstances connected there-

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with, for the purpose of understanding the contract, such subject matter or circumstances may be proved by parol, and such evidence is not in conflict with the rule touching parol evidence to contradict or vary written instruments. (*Greenl. Ev.* §§ 277, 278, 282, 284, 287 *et seq.*)

Prior to the execution of the mortgage in question certain facts existed. The mortgagee held certain notes made by Thomas and indorsed by Truscott, past due, and Truscott's liability had become absolutely fixed; it was no longer contingent. He and Thomas were both the debtors of the bank. They both desired an extension of the time of payment, and negotiated therefor. The creditor consented to give time, and to take new notes made and indorsed as the past due notes were, in case further security should be given. These facts were communicated to the plaintiff, and she was requested to give a mortgage upon her lands, and she consented. The condition in the mortgage is, if Edwin Thomas, his heirs, &c. shall and do well and truly pay or cause to be paid to the mortgagee certain notes made by Thomas and indorsed by Truscott, specifying them, and to which the mortgage is declared a collateral security, then the mortgage to cease, &c. but in case of non-payment of any or either of the notes, &c. then the whole principal to be due, and the mortgagee may enforce payment by foreclosure.

It seems to me that by this instrument, the plaintiff pledged her lands as security for the payment of the debt owing to the mortgagee, which then existed and for which both Thomas and Truscott were absolutely liable, the time for paying the debt being extended, and its existence evidenced by the new notes, made and indorsed as the notes then held by the bank had been made and indorsed. The security was for the payment of the debt for which Thomas and Truscott were liable. True the condition refers to a payment by Thomas, but further on it is expressly declared that the mortgage is a collateral security to the notes,

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which had been described as made by Thomas and indorsed by Truscott. The plaintiff's property could only be taken "in case of the non-payment of any or either of the said notes," &c. A payment of all the notes by Truscott would have relieved her property from the pledge. I do not think that Truscott could have been subrogated to the rights of the bank. It is, in my opinion, too narrow a construction to say that the defendant became surety for Thomas alone. True, as between Thomas and Truscott, the former was the principal debtor; as to the bank both were absolutely bound. The plaintiff gave the mortgage to secure the payment of the debt. I think the referee came to the correct conclusion in finding and deciding that the plaintiff made and executed the mortgage for the benefit and as surety for both Thomas and the defendant, and as collateral security to the notes, as made and indorsed.

I do not think that any error was committed in the admission of evidence. Thomas communicated to the plaintiff the facts, and applied to her to give the mortgage, expressing the opinion that there was no danger of her losing her property; that he thought they would be able to pay the paper; and he told her how the notes were to be made, and they were so made. There is nothing here contradicting or varying the terms or legal effect of the mortgage as properly construed, in the light of conceded surrounding circumstances.

The judgment should be affirmed, with costs of the appeal.

[ERIE GENERAL TERM, February 8, 1869. *Marvin, Lamont and Barker*, Justices.]

ELY vs. THE NEW HAVEN STEAMBOAT COMPANY.

It seems that the extraordinary liability of the proprietors of a steamboat, as common carriers of freight, ceases when the goods transported by them are landed on the wharf, at the place of destination, and are ready for delivery; that thenceforth they are liable only for ordinary care; and that the law does not require from that class of carriers a notice to consignees of the arrival of the goods carried.

But the evidence may establish a course of business between the parties with respect to the mode of delivering goods, which will govern the liability of the carriers in any particular case.

The plaintiffs had been accustomed, for many years, to receive goods, at New York by the defendant's steamboats, as often as once a week. Such boats arrived in New York, each day, at stated hours, morning and evening. Upon the arrival of the boat, each trip, the goods on board were landed on the defendant's wharf, and placed in charge of trustworthy persons employed by them to take care of and deliver the goods to the consignees, and collect the freight, and the boat then started upon her return trip. The plaintiffs always sent their own carman to the wharf, for their goods, soon after the arrival of the boat, and there received them from the persons so employed by the defendants.

Held that a delivery of goods consigned to the plaintiffs, upon the wharf, in the usual way, and the lapse of a reasonable time for the plaintiffs to take away or reject the goods terminated the extraordinary liability of the defendants as common carriers, for the reason that their contract had been performed by a carriage of the goods safely to the point of ultimate destination, and a delivery thereof at the appointed place of delivery. That after those acts, the defendants must be deemed to have renounced their liability as common carriers and assumed that of wharfingers, and they could be held liable only for actual negligence.

Accordingly, where goods consigned to the plaintiffs, after being transported from New Haven to New York upon a boat of the defendants, were landed upon the wharf, at the latter place, early in the morning of July 4th, where they remained, without being called for by the plaintiffs, until about two o'clock A. M. of July 5, when they were destroyed by an accidental fire;

Held that the defendants were not liable for the value of the goods.

Where the contract, in terms, or as affected by the usage of trade, is to deliver the goods at the wharf, notice to the consignee, of their arrival, is not necessary. It is not itself an act of delivery, or equivalent or even akin to it. It is a substitute for it, arbitrarily created.

If usage requires notice to be given to the consignee, the fact that the store of the latter was closed the whole of the day on which the goods arrived, and until after they had been destroyed, will excuse the carriers from giving such notice. They are not bound to go beyond the usage, and seek the consignees elsewhere than at their place of business.

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The facts that goods arrive on the 4th of July is immaterial; that not being a holiday in any sense which affects an action brought to enforce the liability of common carriers as such.

THIS action was brought against the defendants, as common carriers, to recover for the loss of certain leather received by them for transportation from New Haven to New York. The plaintiffs were the agents of the tanneries of Homer Ely and Cotton Ely, of Ashleyville, in Massachusetts, the consignors of the property, and sued as their assignees. The leather was delivered at Springfield, Massachusetts, to the Hartford and New Haven Railroad Company, and by that company delivered at New Haven, on the 3d July to the defendant's steamer, *Continental*, which arrived at her pier in New York, at her usual hour, early in the morning of July 4. The cargo of the vessel, including this leather, was all put on the wharf by eight o'clock, A. M. ready to be taken away by the various consignees, and persons were in attendance during the day to make deliveries of goods. No one called for the leather, and about 2 A. M. of July 5th, an accidental fire destroyed the cargo left upon the pier. The leather was marked and addressed, "H. G. Ely & Sanger, 2 Jacob street, New York." There was no bill of lading or shipping receipt given. The plaintiffs had been in the habit of receiving leather from these tanneries by the defendants' line, for some years, as often as once a week, and generally received from the consignors advices by mail of the shipments. The letters advising of the shipments in question were mailed at Ashleyville, where the consignors resided, instead of Springfield, where the goods were put on the cars, and did not reach the plaintiffs till after the fire. Sometimes, letters from Ashleyville were a week in coming. The plaintiffs kept a cartman, who was in the habit of calling at the pier of the defendants and taking away the leather when it arrived. He was not on duty at all on the 4th of July. There was some discrepancy in the evidence

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as to the practice of notifying the consignees. The plaintiff, Ely, testified that the defendants had always sent notice of the arrival of goods, and that he then sent the cartman for them; but the defendants' witnesses testified that notices were not given to parties in New York, who were the habit of sending for their own goods, except sometimes at the request of the cartmen,⁹ and for their convenience, and these notices, when given, were given by Low & Roberts. They were licensed cartmen in New York; they had an office on the defendants' pier, and on the arrival of the boats received the whole freight list, sorted the cargo, and carted such of it as was addressed to parties in the city not in the habit of sending for their goods; such as was to go to some connecting line, they carted, unless it was addressed to the care of other cartmen. On all the goods they carted they charged cartage, in which the defendants had no interest. Low & Roberts were allowed their office on the pier, free of rent, and in consideration of this, and the opportunity of cartage, they attended to the sorting and delivery of cargo, and collected the freight money for the defendants. The defendants' line of boats had been long established, their pier was No. 25 East river, the boats arrived twice a day, morning and evening, and the plaintiffs had known the times of their arrival and their regular order, for several years. The assignments of the cause of action were made to the plaintiffs without consideration, and solely to enable suit to be brought in their names. They had no pecuniary interest in the claims, and on this ground the defendants objected that the action was improperly brought. This point was overruled, but a verdict was directed for the defendants, on the ground that their special liability as carriers had ceased at the time of the fire.

The exceptions were ordered to be heard at the general term, in the first instance.

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Smith & Woodward, for the plaintiffs. I. The action was properly brought in the name of the plaintiffs. The legal title to the claims being in them under the assignments, they were the real parties in interest within the meaning and intent of section 111 of the Code. (*Arthur v. Brooks*, 14 Barb. 533. *Richardson v. Mead*, 27 id. 179. *Merrick v. Brainard*, 38 id. 574. *Cummings v. Morris*, 25 N. Y. Rep. 625.)

II. The liability of the defendants as common carriers, for loss by fire, continued until the delivery of the goods to the plaintiffs. A delivery at the wharf must have been to some person authorized by the plaintiffs to receive them, or due notice must have been given to them of the time and place of delivery. (2 *Kent's Com.* 605. *Story on Bail.* §§ 507, 511, 528; see also §§ 543, 544, 545. *Miller v. Steam Nav. Co.*, 10 N. Y. Rep. 431. *Ostrander v. Brown*, 15 John: 39. *Heron v. Ship Grafton*, *Olcott's Rep.* 43. *Price v. Powell*, 3 Comst. 322. *Goold v. Chapin*, 20 N. Y. Rep. 259. *Ladue v. Griffith*, 25 id. 364. *McDonald v. Western Railroad Co.* 34 id. 497. *Fenner v. Buffalo and State Line Railroad Co.*, 46 Barb. 103.)

III. To make a delivery on the wharf a substitute for personal delivery, and to excuse the defendants from giving notice to the plaintiffs, so as to exempt them from liability for loss by fire on the wharf, they must prove, by clear and satisfactory evidence, the existence of a long continued and notorious custom for vessels to deliver, and consignees to receive, goods on the wharf without notice.

1. There is no evidence of any such custom in this case; on the contrary, it appears, from the testimony of the defendants, that they have been doing business with the plaintiffs for years under a uniform custom for the defendants to give notice of the arrival of goods consigned to the plaintiffs; that the plaintiffs have always waited for such notice, before they sent for their goods, and they had a right to such notice, before the defendants could be relieved from

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their responsibility, as common carriers, to deliver the goods. (*Angell on Carriers*, §§ 230, 281, 282, 287. *The Schooner Reside v. Sumner*, 567. *Gibson v. Culver*, 17 Wend. 305.)

IV. The 4th of July was a national and state holiday, on which places of business are usually closed, and no business was done on that day. No notice of the arrival of goods, and no goods were sent out by the defendants on that day. The placing of the goods upon the wharf of the defendants on that day, and under such circumstances, cannot, in law, be deemed a delivery to the plaintiffs, so as to discharge the defendants from loss by fire on the wharf. (2 R. S. 285, § 54, *Laws of 1830*, p. 396, § 39. *Id.* 1849, p. 392. *Id.* 1865, 261. *Richards v. Goddard*, 23 How. U. S. 28.)

S. P. Nash, for the defendants. I. Carriers by railroad or steamboat, whose routes end at known depots or wharves, their cars or boats arriving at regular times, are discharged from their *special liability* as carriers, as soon as the goods are landed at their destination, and ready for delivery to the consignees. Their subsequent liability is only for ordinary care. (*Redfield on Railways*, 1st ed. 249, 259; vol. 2 of 2d ed. 54, 55. *The Norway Plains Co. v. The Boston, &c. Railroad*, 1 Gray, 263. *Thomas v. The Boston, &c. Railroad Co.*, 10 Metc. 472. *Farm. & Mech. Bank v. The Champlain Transp. Co.*, 16 Verm. Rep. 52. S. C. 18 id. 131. 23 id. 186. 20 Ill. Rep. 404, 407. 11 Rich. Law, S. C. 337.) 1. The duty of making personal delivery to the consignee, by carts or otherwise, has never been applied to this class of carriers. It is sometimes said, however, that where personal delivery is not made, notice that the goods are ready for delivery, is necessary in order to terminate the special liability of carriers; but no such rule is established in this state in respect to goods arriving under the circumstances above stated. *Ostrander v. Brown*, (15 John. 39,) was a case where the goods arrived by sloop,

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and part had been delivered. One chest of tea was lost by a misdelivery, and the carrier claimed that the notice had relieved him from *all* responsibility. The *dicta* of the case would at this day need qualification, (*Goold v. Chapin*, 20 *N. Y. Rep.* 259, 263; *Gibson v. Culver*, 17 *Wend.* 305;) but the decision does not conflict with the point here made. *Price v. Powell*, (3 *Comst.* 322,) was also a case of an occasional vessel, a brig sailing from New York to Wilmington, and some slabs of marble were found broken, the next day after they were landed. "On the case made, the judge was clearly right in charging the jury, that delivery at the wharf was not sufficient [to discharge the carrier] without notice to the consignee." (p. 326.) 2. When a carrier receives goods to be delivered at a distant point by connecting lines, he may remain liable until the goods are *accepted by*, and not merely *tendered to* the next carrier; for there is a clear distinction between the obligations of a second carrier and those of the owner himself. (20 *N. Y. Rep.* 263.) A tender to the owner or consignee always discharges the carrier. The cases arising as between connecting carriers, (*Goold v. Chapin*, 20 *N. Y. Rep.* 259; *McDonald v. The West. Railroad Co.*, 34 *id.* 497; *Blossom v. Griffith*, 3 *Kern.* 569; *Ladue v. Griffith*, 25 *N. Y. Rep.* 364; *Fenner v. Buffalo, &c. Railroad Co.*, 46 *Barb.* 103,) do not consequently apply.

II. A usage for the consignee to leave the goods till called for, terminates the carrier's special responsibility. (*Gibson v. Culver*, 17 *Wend.* 305.) An arrangement between the parties for a similar purpose has the same effect. (*Hathorn v. Ely*, 28 *N. Y. Rep.* 78.) In this case, the plaintiffs, with knowledge of the time and place of daily arrival of the defendants' boats, sent regularly their own cartman for their goods. This practice was a waiver of any obligation to give notice, and if they chose to let their goods lie without sending for them, the defendants held them under the liability for ordinary care, not as insurers.

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III. There is no rule of law requiring notice. Notice in lieu of personal delivery was a relaxation growing out of new methods of carriage, and the necessities of business. It was sanctioned by the courts, not as a new and rigid rule applicable to all cases, like a statute, but as a just modification of a previous rule which the changed modes of conveyance had rendered inapplicable. Notice is not necessary to a passenger coming in the same vessel with his goods or luggage. In such case, the special liability of the carrier ceases, after the property is ready for delivery, as soon as the passenger has had a reasonable time to take it away. (*Roth v. Buffalo, &c. Railroad Co.*, 34 *N. Y. Rep.* 548.) Here, the owners of the goods sent them to their own agents, starting their transit at Springfield, on the 3d of July, by a well known route which they had used for years. They knew when they should arrive at New York. A letter mailed at Springfield would have probably reached their consignees as soon as the goods reached the wharf, but they chose to mail their advices of the shipment from a country town with less frequent mails. A telegram would have reached the consignees on the 3d. The plaintiffs are, therefore, chargeable with notice and with delay in sending for their goods.

IV. The plaintiffs cannot claim to extend the liability of the defendants as insurers over the 4th of July, into the 5th, on the ground of the 4th being a holiday. It is not a day on which labor is unlawful. The plaintiffs had a right to close their store if they chose, but no greater right to do so than the defendants to store the goods and go away. If the plaintiffs chose to leave their goods till the 5th, they lost the defendants' responsibility as insurers, and retained only that of ordinary bailees. (*Richardson v. Goddard*, 33 *How. U. S.* 28. *Jones v. Norw. and N. Y. Transp. Co.*, 50 *Barb.* 193, 194.)

V. The plaintiffs' store was not open, nor was their cartman on duty on the 4th July. A notice would therefore,

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have been ineffectual. The point of want of notice, therefore, simply resolves itself into the question, whether a consignee by closing his business on a holiday can extend the liability of a carrier as insurer for an indefinite period.

VI. The fact that Low and Roberts chose to accommodate their brother cartman by undertaking to send him notices and so save him useless trips to the boat, cannot enlarge the liability of the defendants.

VII. If the goods were still in the custody of the defendants, as carriers, when the fire occurred, the defendants were exempt from liability under the act of congress of March 3, 1851. (*See Moore v. West. Transp. Co.*, 24 How. U. S. 1. *Walker v. The Transp. Co.*, 3 Wallace, 150.)

By the Court, GILBERT, J. It is apparent that the circumstances in which the harsh and rigid rules of the common law, governing the liability of common carriers, had their origin, have greatly changed, and that some amelioration of these rules has become necessary since the introduction of steamboats, railroads and the electric telegraph. Courts, mindful of this necessity, have gradually modified these rules in accordance with their views of public policy and individual right. The precise nature and extent of this modification, however, is still very uncertain, and an attempt to reconcile the conflicting decisions on this subject would be fruitless. If it were necessary, we should be inclined to hold that, independently of the usage proved in this case, the extraordinary liability of the defendants as common carriers ceased when the goods were landed on the wharf and were ready for delivery; that thenceforth they were liable only for ordinary care, and that the law does not require from the class of carriers to which the defendants belong, a notice to consignees of the arrival of the goods carried. Such rule, we think, best accords with sound public policy, and with the intentions of the parties in making the contract, and it is sus-

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tained by the more judicious of the recent decisions of the courts on this subject. (*Norway Plains Co. v. Boston, &c. R. R. Co.* 1 *Gray*, 263. *Thomas v. The Same*, 10 *Metc.* 472. *Lamb v. West. R. R. Co.*, 7 *Allen*, 98. *Northrup v. Syracuse, &c. R. R. Co., Court of Appeals, March, 1867.*) But we are of opinion that the evidence clearly establishes a course of business between the parties in relation to the mode of delivering goods, which must govern the liability of the defendants in this case. The plaintiffs had been accustomed, for many years, to receive goods by the defendants' boats as often as once a week. These boats arrived in New York each day at stated hours, morning and evening. Upon the arrival of the boat each trip, the goods on board were landed on the defendants' wharf, and placed in charge of trustworthy persons, employed by them to take care of, and deliver the goods to the consignees, and collect the freight, and the boat then started upon her return trip. The plaintiffs always sent their own cartman to the wharf for their goods, soon after the arrival of the boat, and there received them from the persons so employed by the defendants. A delivery upon the wharf, therefore, in the usual way, and the lapse of a reasonable time for the plaintiffs to take away or reject the goods, terminated the extraordinary liability of the defendants as common carriers, for the reason that their contract had been performed by a carriage of the goods safely to the point of ultimate destination, and a delivery thereof at the appointed place of delivery. After those acts, the defendants must be deemed to have renounced their liability as common carriers and assumed that of wharfingers, and they could be held liable only for actual negligence. (*Hyde v. Trent Nav. Co.*, 5 *T. R.* 397, *per Buller J.* *Gatliffe v. Bourne*, 4 *Bing.* 314. *S. C.* 1 *Scott*, *N. R.* 1, and 8 *id.* 604. *Abb. on Shipping*, 5th *Am. ed.* 463. *Gibson v. Culver*, 17 *Wend.* 305. *Goold v. Chapin*, 20 *N. Y. Rep.* 259, *per Strong, J.* *Hathorn v. Ely*, 28 *id.* 78.)

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It is not contended on the part of the plaintiffs that there was any negligence on the part of the defendants.

It is, however, urged by the learned counsel for the plaintiff, that the defendants' liability as common carriers continued until after the loss of the goods, because according to the course of business referred to, a notice should have been given to the plaintiff of the arrival of the goods. As before intimated, where the contract in terms, or as affected by the usage of trade, is to deliver the goods at the wharf, notice is not necessary. It is not itself an act of delivery, or equivalent or even akin to it. It is a substitute for it arbitrarily created. There was perhaps enough evidence that the duty of sending a notice to the plaintiff's store of the arrival of their goods formed a part of the usage in this case, to require the submission of that question to the jury, if it had been material to the determination of the case. But we are of opinion that if the fact were so, the plaintiff's store having been closed the whole of the day on which the goods arrived, and until after the goods had been destroyed, the defendants were excused from giving the notice. Absence of the consignee dispenses with notice. (*Fisk v. Newton*, 1 *Denio*, 45; *Northrup v. Syracuse, &c. R. R. Co.* *supra*.) The defendants were under no obligation to go beyond the usage alleged, and seek the plaintiffs' elsewhere than at their store.

The fourth of July was not a holiday in any sense which affects this case.

The judgment should be affirmed.

[KINGS GENERAL TERM, February 10, 1869. *J. F. Barnard, Gilbert and Tappan*, Justices.]

WARHAM BROWN and others, appellants, vs. CHARLOTTE H.
BROWN, executrix, &c. respondent.

The statute provides how the account of an executor shall be rendered, upon any accounting before the surrogate, and what examination may be had, (2 R. S. 92, § 54,) and when the settlement appears to have been final, and all the parties interested to have been before the surrogate, the presumption must be that the settlement embraced every thing which was a proper subject of inquiry.

Where, upon a proceeding before the surrogate to compel a final accounting, by an executrix, it appeared that several years previously, upon the petition of the executrix for a final settlement of her accounts, citations were issued to all the parties interested, and an accounting had; that the same parties who appeared in the second proceeding, appeared on that occasion by counsel, and were heard before the surrogate; and a final decree was made thereon by the surrogate, from which such parties did not appeal; *Held* that the settlement of the executrix's account in such previous proceeding was to be deemed final and conclusive as to all matters up to the time when it was made, and was therefore the proper basis for the accounting to be had in the second proceeding; and the executrix was not bound to go behind it. Such former settlement would not be conclusive, however, if it were made to appear, affirmatively, that there were other assets which had come to the hands of the executrix properly chargeable to her, and which were not embraced in the account. *Per* JOHNSON, J.

The statute does not declare that such settlement shall be conclusive as to the assets which have come to the hands of the executor. But as that is a proper subject of inquiry, upon every such settlement, it should be deemed to have been made, and the decree founded upon the accounting be so far conclusive as to form the basis of a further final accounting, unless something is shown to have been in the hands of such executor as assets, which should have been accounted for, but was not. *Per* JOHNSON, J.

THIS is an appeal from a decree of the surrogate of Monroe county, entered October 23, 1867, upon the final accounting of the respondent as sole executrix of, &c. of Matthew Brown, deceased.

The testator died December 28, 1851. The decree of the surrogate adjudged the sum of \$7150.54, to be due to the executrix, which sum, together with the costs, was ordered to be paid to her out of the assets. The petition of appeal alleged that letters testamentary were issued to the respondent on the 15th day of March, 1852. That the

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appellants are residuary legatees, mentioned in said will. That on or about the 20th day of March, 1867, the respondent made application to the surrogate for a final settlement of her accounts as such executrix, which was ordered, and citations duly issued. That thereupon an account was rendered to the surrogate by said executrix, which being unsatisfactory to the petitioners the same was controverted by them. And upon the issues formed the respective parties proceeded before the said surrogate to take the evidence, written and oral, on the part of the appellants to impeach, and on the part of the respondent to sustain, their allegations on such accounting. That after the said proof was taken, a hearing was had before such surrogate, and a sentence or decree was pronounced by him on the 23d day of October, 1867, affirming the said account; and the appellants being advised that the said sentence or decree was erroneous, had appealed therefrom to this court, and among grounds of error the following were stated: The surrogate held and decided that the accounting of 1861 was final and conclusive as rendered, and could not be opened. The surrogate declined to investigate any of the matters included in that account, and matters occurring prior to its rendition. The surrogate declined to charge the executrix with property received prior to that accounting, and not accounted for in the accounts. The appellants insisted that the respondent should make and file an inventory of the personal property received by her, and a schedule of the real estate. The surrogate declined so to hold. The appellants claimed that certain items of the accounts rendered, should be disallowed. The surrogate held the contrary. The surrogate allowed to the executrix the annuity of \$700 for the year 1867, and at the same time the legacy of \$10,000.

The named respondent, in her answer to the petition of appeal, stated:

First. She admitted her appointment as executrix of the

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last will and testament of said Matthew Brown; that the appellants are residuary legatees under said last will and testament; that she (the respondent) made application for a final settlement of her accounts as such executrix, on or about March 20, 1867, and that thereafter such accounting was had and proofs given relating to the whole period covered by the trust power so exercised by her since the decease of said Matthew Brown; and that upon the coming in of the auditor's report relating thereto, and based upon all such proofs, a decree was pronounced by the surrogate as stated in said petition.

Second. The respondent denied that the surrogate failed to examine and adjudicate upon the matters of account relating to said estate prior to January, 1861; but, on the contrary, she stated that the appellants offered proofs which were duly passed upon and considered, affecting the property and assets received by the respondent since the decease of the testator.

Third. The respondent admitted that the surrogate did not insist that she should file an inventory and schedule of the personal property and real estate received by her in any other manner or form than as stated, and defined specifically in the proofs upon which the said surrogate passed, and which were considered by him as the basis of his decree entered upon such final account.

Fourth. The respondent admitted that the claim of the appellants in reference to the first nine items of the account as filed, and also to the annuity of \$70 for the year 1867, was made as stated in said petition; and also admitted the finding of the surrogate in affirmance of the auditor's decision in favor of the respondent.

The respondent insisted that all the findings embodied in said decree were just and correct, and she asked that the same be affirmed and declared conclusive in all respects by this court, and with such further, other or different relief or remedy as might be just in her favor.

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C. H. Clark, for the appellants.

DeL. Crittenden, for the respondent.

By the Court, JOHNSON, J. This appeal is from the decree of the surrogate upon a final accounting by the defendant; and one of the principal questions in the case is, whether the accounting in question was properly made upon the basis of a former final accounting in 1861, or whether it should not have gone back to the commencement of the defendant's trust, as executor, and embraced the whole subject of assets, charges and credits. I am clearly of the opinion that the settlement of 1861, was the proper basis of this settlement, and that it was not necessary for the defendant to go behind it, for any purpose, by reason of any thing which appears in the case upon this appeal. That was a final settlement, by the very terms of the decree, and the proceeding was instituted for the purpose of having it final. Citations were issued to all the parties interested; and the same parties who appear here, then appeared by counsel, and were heard before the surrogate in respect to all matters embraced in such accounting. A final decree was made thereupon by the surrogate, which the appellants did not appeal from, but suffered to remain as such final decree. The statute provides how the account shall be rendered upon any accounting, and what examination may be had. (2 R. S. 92, § 54.)

And where the settlement appears to have been final, and all the parties interested to have been before the surrogate, the presumption must be that the settlement embraced every thing which was the proper subject of inquiry. (*President, &c. of Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216. *Glover v. Holley*, 2 Brad. 291. 2 R. S. 94, § 65.) This section declares as to what subjects it shall be conclusive. It would not, I think, be held conclusive, in case it could be made to appear affirmatively that there were

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other assets which had come to the hands of the executor or administrator, properly chargeable to him, and which had not been embraced in the account. This opinion was expressed in *President, &c. of Bank of Poughkeepsie v. Hasbrouck*, above cited. The section of the statute referred to does not declare that such settlement shall be conclusive as to the assets which have come to the hands of the executor or administrator. But as that is a proper subject of inquiry upon every such settlement, it should be deemed to have been made, and the decree founded upon the accounting be so far conclusive as to form the basis of a further final accounting, unless something is shown to have been in the hands of such executor or administrator, as assets, which should have been accounted for, but was not. Here nothing is shown, but the point is, that the defendant should have gone back to the commencement as matter of course. I am of the opinion, therefore, that both the auditor and the surrogate were right in holding that the decree on the final accounting in 1861 was conclusive, as the case stood. The auditor, in his report, says, "there is nothing upon the face of the account or in any proof made before me, which cast any suspicion of inaccuracy or mistake, much less of fraudulent intent in the matters covered" by such accounting. It appears affirmatively, by the decree and the abstract of the accounts filed, that an account of assets was then rendered by the defendant.

The next question of most considerable importance, relates to the allowance of the charge of \$700 a year, paid as an annuity under the provisions of the will. It is for the appellants to show that this was erroneous. There is no copy of the will before us, and I do not see how we can pronounce that allowance erroneous without knowing definitely and precisely what were the terms and conditions of the will, under which the payment is claimed to have been made.

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From the statement in the report of the auditor in regard to the terms and conditions of the will in that respect, and also in regard to the condition of the estate while such payments were being from year to year made, I do not see but they were properly made. At all events, there is not enough appearing to enable the court to pronounce them improper and unauthorized.

Items one and two in statement B. were properly allowed as credits, as the defendant in statement A. had charged herself with the whole rent as though the whole had been received. The next four items in statement B. under date of January 9, 1861, for taxes paid, seem to have been properly allowed, as the auditor has found that they are not the same allowed in the settlement of 1861, but that those charges then allowed were for taxes of previous years, paid in 1861.

The defendant's exception to the disallowance of the credit to her, of \$34.80 for sodding the burial lot in Mount Hope Cemetery, belonging to the estate, cannot prevail, or indeed be considered. There being no copy of the will in the case, it is impossible for the court to determine whether it was a proper charge or not. On the whole, I do not find any error which would justify a reversal or modification of the decree. It must, therefore, be affirmed, with costs of the appeal.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson* and *J. C. Smith*, Justices.]

THE GENESSEE VALLEY NATIONAL BANK *vs.* THE BOARD
OF SUPERVISORS OF LIVINGSTON COUNTY.

No action will lie to recover of a county, or of a municipal corporation, money collected or received upon or for a tax based upon an erroneous assessment. If the assessors have acquired no jurisdiction, of the person, the case of *Mygatt v. The Supervisors of Chenango*, (11 N. Y. Rep. 568,) still gives an action against them; but, when they have such jurisdiction, no suit can be maintained against any person for the imposition or collection of a tax erroneously imposed.

Where assessors, having jurisdiction of a bank, and of the subject matter, the description, amount and value of its property liable to taxation, assess such bank at the full amount of its capital, they, in so doing, act within their jurisdiction, and if they err, the error is a judicial one, which can be reviewed upon certiorari, but clearly cannot be reviewed in a collateral suit or proceeding.

ACTION to recover from the county of Livingston a portion of two several taxes paid by the plaintiff to the collector of the town of Geneseo, which taxes were based upon the annual assessment of said town, for the year 1864, duly made and returned to the board of supervisors. The action was tried at the Livingston circuit in November, 1867, before a justice of this court, without a jury, who found as facts:

That the plaintiff is a banking association and corporation, organized and existing under and by virtue of the provisions of an act of congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States stock, and to provide for the circulation and redemption thereof," approved June, 1864, and is located and doing business as such at the village of Geneseo, in the county of Livingston and state of New York, and has been such banking association and corporation since about the 14th day of March, 1865, and is the successor of, and has succeeded to all the property and rights in action of the Genesee Valley Bank, which, prior to the said 14th day of March was, and since the year 1851 had been a banking association and corporation,

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organized and existing under and by virtue of the public laws of the state of New York, which authorized the business of banking, and was located and did business at the said village of Geneseo. That the said plaintiff became such successor of the Genesee Valley Bank under and in pursuance of an act of the legislature of the state of New York, entitled "An act enabling the banks of this state to become associations for the purpose of banking under the laws of the United States," passed March 9, 1865. That in the month of August, 1864, the capital stock of the said the Genesee Valley Bank was \$150,000. That said capital stock consisted of, and was composed in part of United States government bonds and securities deposited by said bank with the superintendent of the banking department at Albany, to the amount and extent of \$89,150, which was so much of the capital stock of the said bank. That in said month of August, 1864, the then acting assessors of the town of Geneseo, Livingston county, N. Y. made their annual assessment of persons and corporations liable to be assessed for state, county and town taxes for the state of New York, county of Livingston, town of Geneseo, for the then coming year. That in making said assessment said assessors, against the objection and protest of the said Genesee Valley Bank, assessed the whole amount of the capital stock of said bank, and charged said bank with a valuation of \$150,000, the whole of the capital stock, as the sum upon which they claimed the said bank was liable to pay taxes for said state, county and town for the next year ensuing such assessment; that said assessors were duly informed that the said assessment was excessive in that it should have been made for the sum of \$60,850 only, but they declined and refused to correct the same, and thereafter returned to the defendant, in the said year, the annual assessment roll of the said town of Geneseo, in which said bank was assessed for its whole capital stock, to wit, in the sum of \$150,000.

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That the said defendant, the board of supervisors of Livingston county, at a meeting of said board in the month of November, 1864, directed a levy and assessment of the taxes for state, county and town purposes, to be made upon the taxable property of the town of Genesee, so returned to said board by said assessors, and in the month of December, 1864, by warrant signed by the several members of the said board of supervisors, attached to the tax roll for the said town of Genesee, the said defendant required and directed the collector of the town of Genesee to collect from the Genesee Valley Bank as part of the said taxes of the state, county and town, to be levied and collected upon the taxable inhabitants and property of the said town, the sum of \$2727.56—the same being the tax to be levied by said defendant upon said bank, upon the whole amount of its capital stock of \$150,000; that said collector, in pursuance of the directions and by virtue of the said warrant and tax roll, proceeded to levy and collect said tax from the said bank, and collected from the said bank in pursuance and by virtue thereof, on the 12th day of January, 1865, including his fees, the sum of \$2758.98, and paid the same, less his fees, not exceeding five per cent thereof, into the hands of the county treasurer of the county of Livingston for the use of said county; that of said sum so collected and paid into the hands of the treasurer by said collector, the sum of \$1640.36 was collected and paid as aforesaid as a tax upon the said United States bonds and securities exempt from taxation, and was so levied and collected against the objections and protest of the plaintiff.

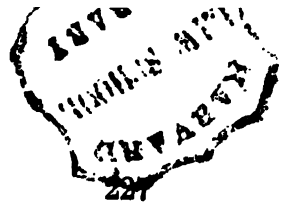
That in the month of April, 1865, the said defendant caused another levy of taxes for the said county of Livingston to be made, and caused another tax roll with a warrant signed by the several supervisors of the county of Livingston thereto annexed, for the collection of county

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taxes, known as the county bounty tax, to be issued to the collector of the said town of Genesee, which levy of taxes was based upon the said assessment so made by the assessors of the said town, in and by which tax roll and warrant the said collector was required to collect from said the Genesee Valley Bank \$1763.75, with his fees; that by the direction of the said warrant and tax roll so issued, the said collector of the town of Genesee proceeded to levy and collect from the said Genesee Valley Bank, and from the said plaintiff as the successor of the said Genesee Valley Bank, in satisfaction of the said tax roll and warrant, the sum of \$1377.42 on the 30th day of June, 1865; that said tax was levied upon the whole capital stock of the said Genesee Valley Bank and that the sum of \$820.18 thereof was levied and collected as a tax upon the said United States bonds and securities exempt from taxation, and was levied and collected against the objections and protest of the plaintiff, and that the same was paid by the said collector into the hands of the treasurer of the county of Livingston to the use of the said county. That said defendant has been requested and has refused, before suit, to refund to the plaintiff the said several sums, to wit, the sum of \$1640.36, so collected on the 12th day of January, 1865, and the sum of \$820.18 so collected on the 30th day of June, 1865.

The judge found, as conclusions of law: That said several sums of \$1640.36 and of \$820.18 were an illegal and excessive levy and collection of taxes, and were levied, collected and paid to the said treasurer of the county of Livingston, without authority of law in the premises, and that the said county of Livingston had and received the same to the use of the plaintiff, and that the plaintiff was entitled to recover against the defendant the said sum of \$1640.36, and interest thereon from the 12th day of January, 1865, and the further sum of \$820.18, and interest thereon from the 30th day of June, 1865, making the sum of

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\$2916.91 at the date of the report, for which said sum of \$2916.91, judgment was ordered to be entered in favor of the plaintiff, and against the defendant, besides the costs of this action.

From the judgment so entered, the defendant appealed.

J. B. Adams, for the appellants. I. The action for money had and received upon an implied contract cannot be sustained in this case. 1. Because it is brought for the purpose of trying the title or validity of a tax, and that form of action was not intended, and has never been sanctioned in this state for such a purpose. (*Swift v. City of Poughkeepsie*, 37 *N. Y. Rep.* 511. *Chegary v. The Mayor, &c. of New York*, 13 *id.* 220, and cases cited, 223, 224.) The cases cited, in Massachusetts, are peculiar to that state; no objection to the form of action was there taken, and those cases have never been approved by the courts of this state. 2. Because the remedy of the plaintiff was by an application to the assessors for review as provided by statute, or certiorari, or by mandamus, or by trespass against the supervisors who issued the warrant, or against the assessor who commenced the wrong. (13 *N. Y. Rep.* 220, and cases cited, 223, 224. 23 *id.* 224, 242.) 3. Because it is an attempt to review and reverse the judgment of the tribunal of assessors in a collateral action, which cannot be done, either directly or indirectly. (*Ontario Bank v. Bunnell*, 10 *Wend.* 186. *Livingston v. Hollenbeck*, 4 *Barb.* 9.)

II. The plaintiff was a corporation whose place of business was located in Genesee, within the jurisdiction of the assessors making the assessment, and of the board of supervisors which issued the warrant. The assessors acted judicially in determining the amount for which the plaintiff was liable to be taxed; and every corporation and owner of property within that town was, in law, a party to the proceeding. Their judgment, though erroneous, is conclusive until it is reversed, which can only be done by

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certiorari, prohibition, &c. (*Swift v. The City of Poughkeepsie*, 37 N. Y. Rep. 511. *Weaver v. Devendorf*, 3 Denio, 117. *The People v. Supervisors of Chenango Co.*, 11 N. Y. Rep. 563. *Sandford v. The Mayor, &c. of New York*, 33 Barb. 148. *Chegaray v. Jenkins*, 1 Seld. 381. *Bell v. Pierce*, 48 Barb. 51. *Chagaray v. The City of New York*, 19 N. Y. Rep. 231. *Van Rensselaer v. Cottrell*, 7 Barb. 127. *Same v. Witbeck & Sharp*, 7 id. 133.)

III. The taxes in both warrants were paid *voluntarily*, and therefore cannot be recovered back. 1. It is admitted that the first tax was paid within thirty days from the time of the receipt of the tax roll and warrant by the collector. At that time the collector could legally act as a *receiver* of taxes only, and could not make a valid levy. (*Parker v. Brown*, 17 Barb. 145.) Payments made within such thirty days are termed "voluntary payments," by 3 R. S. 5th ed. p. 918, § 2. The warrant for the other tax, issued to the collector, April 19, 1865, neither gave nor purported to give to the collector authority compulsorily to collect the tax after the first day of June, 1865, and the demand of the collector at the time the pretended levy was indorsed on the roll by the teller of the bank, was only a demand of voluntary payment, as the officers of the bank being in possession of the tax roll and warrant, had all the means of judging as to the liability of the bank to pay the tax, and the collector's powers, under the warrant, which the collector possessed. (*The New York and Harlem Railroad Co. v. Marsh*, 12 N. Y. Rep. 308.) 2. "Assumpsit will not lie to recover money which a party has voluntarily paid, or in consequence of an action brought, though the demand was unlawful, and paid with a reservation of the party's rights, for the party should have resisted the payment. (1 *Esp. Dig.* 119, and other cases cited in *Hall v. Shultz*, 4 John. 240, n. a. *Clinton v. Strong*, 3 John. 370, n. a. *Clarke v. Dutcher*, 9 Cowen, 674.) 3. The protest of the plaintiff does not render the payment any the less voluntary, the payments being both

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made when the collector could not make a legal levy, and the plaintiff and officers being possessed of a full knowledge of all the facts and circumstances upon which the taxes were demanded. (*The Rector of Trinity Church v. Mayor of New York*, 10 How. 138. *Harmony v. Bingham*, 12 N. Y. Rep. 99 and 308. *Commercial Bank of Rochester v. City of Rochester*, 42 Barb. 488.) In *Fleetwood v. The City of New York*, (2 Sandf. 481,) which was a case like this, the general term of the Superior Court say: "Where there is *no legal compulsion*, a party yielding to the assertion of an adverse claim, cannot detract from the force of his concession by saying, I object, or I protest, at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim." 4. The county cannot be held liable for the act of the collector in levying on the plaintiff's property after his warrant had expired. (*Lorillard v. The Town of Monroe*, 11 N. Y. Rep. 392.)

IV. The receiving of the money by the county treasurer creates no liability in this case to the plaintiff, so long as the plaintiff is not pursuing the specific property taken. (*The People v. Supervisors of Chenango County*, 11 N. Y. Rep. 563.)

V. Even if the county of Livingston be liable for so much of the tax collected from the plaintiff as was expended for county purposes, it cannot be liable equitably for that portion which was assessed for town charges, as that was never received by the county treasurer, but was paid by the collector to the supervisor and commissioners of highways of Genesee, by direction of his warrant. As to the portion levied for state purposes, the county treasurer receives that as the agent of the state only, to whom he accounts for the same, being required to execute a bond to the state conditioned for its payment, &c. under chapter 696, Laws of 1866, and is paid by the state for receiving and paying over the state tax. It must, of course, be

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presumed that the county treasurer paid over the whole of the state tax before this suit was commenced as he was required by law.

VI. No action can be maintained against the board of supervisors for neglecting or refusing to allow a claim against the county which they had authority to audit and allow: the only remedy in such a case is a mandamus. (*Boyce v. Supervisors of Cayuga Co.* 20 Barb. 294.)

A. J. Abbott, for the respondent. I. The assessors had no jurisdiction to assess that portion of the capital stock of the bank which was invested in United States bonds. These bonds were exempt from taxation, under the constitution of the United States, independent of any express exemption by congress, as the authorities cited below show. They were also expressly exempt under the several acts of congress under which they were issued. They were also exempt under the statute of this state. It was, of course, the duty of the assessors to determine the character of the securities in which the capital stock of the bank was invested. Having determined their character, as they did, and decided that they were United States bonds, they had no jurisdiction over them, and their act in assessing them was unconstitutional and absolutely void. Such act was not simply voidable, but void, as the authorities cited below clearly show, the dictum of Judge Bacon, in 37 N. Y. Reports, hereinafter examined, to the contrary notwithstanding. Of course, the subsequent proceedings, based upon such assessment, the levy of the tax by the board of supervisors, &c. were also void. (*Const. of the United States. Laws of Congress exempting the public securities.* 1 R. S. 5th ed. 906, § 5, subd. 1. 2 Black, U. S. 620. 2 Wallace U. S. 200. *Monroe Co. Savings Bank v. City of Rochester*, 37 N. Y. Rep. 365. *The People, ex. rel. The National Broadway Bank v. Hoffman, Mayor, &c.* 37 N. Y. Rep. 9, and the *Laws of Congress and cases there cited. The People, ex. rel. Cagger v. Dolan*,

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36 *id.* 59. *The People, ex rel. Cunningham v. Roper et. al.*
 35 *id.* 629. *The People, ex rel. Kennedy v. Com. of Taxes, Id.* 423. *The City of Utica v. Churchill*, 33 *id.* 161. *Whitney v. Thomas*, 23 *id.* 281. *Mygatt v. Washburn*, 15 *id.* 316. *The People, ex rel. Mygatt v. Supervisors of Chenango Co.*, 11 *id.* 563. *Van Benschelaer v. Witbeck*, 7 *id.* 517. *Tallman v. White*, 2 *id.* 66.) It is decided, on the doctrine recognized in the above cases, that acts of assessors, or other officers, in cases like the present, are without jurisdiction, unconstitutional and void, and it makes no difference whether the act is regarded as judicial or simply ministerial.

II. The payment by the bank was in no sense voluntary. The payment of the first tax was made under protest by the bank, and a threat to levy by the collector. In the case of the second tax, the collector not only threatened to levy, but did levy, &c. In respect to this last tax, the counsel opposed lays some stress upon the fact that the warrant was returnable 1st June, and the levy made 30th June. But this is of no consequence. The supervisors had spread the tax, issued the warrant for its collection; the collector at the time claimed the right to levy, did levy, and the money went into the county treasury. (8 *Bosw.* 148.) At the worst, there was a mistake of fact, on the part of the bank officers, as to the time of the return of the warrant, which can make no difference with the right of recovery. The first tax is not affected with this question. The general rule in regard to voluntary payment is, that when payment is made under compulsion, or threat of compulsion, or to procure the release of property wrongfully taken, or to prevent property from being taken, &c. the payment is not voluntary, and the money may be recovered.

III. The act of the assessors, and the proceedings of the supervisors based thereon, being without jurisdiction, unconstitutional, and consequently void, the tax not having

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been voluntarily paid, and the money thus obtained having gone into the treasury of the county, and the county having had the benefit of the same, equity and justice demand that the county should refund the money, with the interest thereon. This is the "equitable action for money had and received," and the just and equitable doctrine should prevail here, that, (in the language of the courts,) "the action for money had and received will lie wherever the money sought to be recovered belongs, *ex æquo et bono* to the party seeking the remedy, and will be applied in every case when a person or corporation has received money which in equity and good conscience ought to be refunded to the true owners." (*Hill v. Supervisors*, 12 N. Y. Rep. 52. *The People, ex rel. Mygatt v. Supervisors of Chenango Co.*, 11 id. 563. In this case see 2d and 3d points of *Beardsley*, and cases cited by him, page 567, and points of *Hill* and cases cited by him, page 569. *Allen v. Mayor*, 4 E. D. Smith, 404. 1 *Wait's Practice*, 706, et seq. 4 *Pick.* 361. 5 id. 498. 11 id. 396. 21 id. 64 and 382. 4 *Metc.* 181. 5 id. 73. 1 id. 242. 8 *Bosw.* 148. See also 16 *Cal. R.* 167; 23 id. 111; 48 *Maine R.* 440; 21 *Ill. R.* 605; 25 id. 411; 7 *Geo. R.* 64.)

By the Court, E. DARWIN SMITH, J. The plaintiffs' bank is located in the town of Genesee, where it was assessed, and must, for the purposes of taxation, be deemed a resident. The assessors, therefore, had jurisdiction of the person of the plaintiff and of the subject matter, the description, amount and value of their property liable to taxation. In assessing the plaintiff at the full amount of the capital of the bank, they acted within their jurisdiction, and if they erred, the error was a judicial one which could have been reviewed upon certiorari, but clearly cannot be reviewed in a collateral suit or proceeding. The assessors held that the plaintiff was liable to be assessed upon the whole amount of its capital stock. In this they

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differed, in opinion, with the Court of Appeals of this state and with the Supreme Court of the United States, in several cases. (*Bank of Commerce v. New York City*, 2 Black. 620. 2 Wallace, 200.) But the assessment was not void because it was erroneous. This question was distinctly decided in *Van Kleeck v. Woodruff*, and *Foster v. Wanwyck*, (not reported,) as Judge Bacon states in the case of *Swift v. The City of Poughkeepsie*, (37 N. Y. Rep. 512,) and in *Barhyte v. Shepard*, (35 id. 238.) I cannot see why the case of *Swift v. The City of Poughkeepsie* does not conclusively cover this case. It is true that was an action by a stockholder of a bank, who, under the act of 1866, was clearly liable to taxation for the full value of his stock in the bank, and this is an action by the bank for an assessment against the bank. But the opinion of Judge Bacon, which was concurred in by the whole Court of Appeals, in principle, covers both cases, and decides definitively and settles the question conclusively, and, I think, properly, that no action will lie to recover of the county, or of a municipal corporation, money collected or received upon or for a tax based upon an erroneous assessment. If the assessors have acquired no jurisdiction of the person, the case of *The People, ex rel. Mygatt v. The Supervisors of Chenango*, (11 N. Y. Rep. 563,) still gives an action against them; but, when they have such jurisdiction, this case of *Swift v. The City Poughkeepsie* holds that no suit can be maintained against any person for the imposition or collection of a tax erroneously imposed. It is, therefore, our duty to reverse the judgment rendered in this case. Whether the plaintiff has any remedy for the recovery of the money received by the defendants without right and according to what now, in the light of decisions since made, was a clear mistake of law, other than an appeal to the justice of the board of supervisors, is a question we are not called upon to decide.

Mynderse v. Snook.

The *dictum* or suggestion in *The People v. Reddy*, (43 Barb. 544,) that an action would lie in such a case, was added to a finished opinion at the suggestion of one of my brethren, without due examination, and is doubtless mistaken.

The judgment must be reversed, and a new trial granted.

[MONROE GENERAL TERM, March 1, 1869. *E. Darwin Smith, Johnson* and *J. C. Smith*, Justices.]

MYNDERSE vs. SNOOK & STEVENS.

In an action upon a promissory note made by the defendants, payable to the plaintiff or his order, the defendants set up a defense that the note belonged to the plaintiff and one V. as partners, under the firm name of "M. & Co.;" and they set up a counter-claim in their favor against M. & V. as such partners. On the trial they gave evidence tending to show that the money advanced, and for which the note was given, was advanced in pursuance of a contract between them and M. & Co. and was the money of M. & Co.; also to show a breach of the contract by M. & Co. and that damages had accrued to the defendants from such breach.

The plaintiff testified that the money advanced was his money, and that the note belonged to him, and V. had no interest in the same or in the money. *Held* that the plaintiff, owning and holding the note in his own right, could maintain an action thereon, in his own name alone, to recover the amount due by its terms. And that if the question of the exclusive ownership of the note by the plaintiff was of any importance, it should have been submitted to the jury; at least the plaintiff should not have been nonsuited on that question.

Held, also, that the circumstance that the money for which the note was given was advanced upon the contract, did not make it necessary for the parties to the contract to unite in an action upon such note; the contract itself providing that the defendants should give their note for money to be loaned by the plaintiff, without saying to whom the same should be made payable, and the note being severed from the contract, by the act and consent of all the parties, at the time it was executed.

The note, in such a case, is no part of the agreement, but a separate and independent promise made by the defendants in execution and fulfillment, *pro tanto*, of that part of the agreement on their part.

Mynderse v. Snook.

THIS was an action brought by the plaintiff against the defendants upon a note for \$1000, dated October 6, 1866, made by the defendants, payable to the order of the plaintiff, on the first day of March then next, with interest. The answer of the defendants was of a threefold character:

1st. That the plaintiff and one E. M. Van Cleef were partners in the distillery business at Dresden, Yates Co., doing business under the name, style and firm of Mynderse & Co.; that the note belonged to such firm; and that Van Cleef should have been joined as a party plaintiff in the action. The second answer sets up the making and execution of a written agreement between the firm of Mynderse & Co. and the defendants, on the 28th day of September, 1866, by which Mynderse & Co. agreed to furnish distillery slops, &c. to feed 250 hogs, until the first of March following, at sixteen cents each per head per week, and also to loan to the defendants \$1000 for the purchase of said hogs, upon their note with interest until the first day of March, the time for which they were to be fed, the loan to be a lien on the hogs until paid. That, in pursuance of that agreement, Mynderse & Co. loaned to the defendants the \$1,000 for which the note was given. The answer then alleges the breach of the agreement by Mynderse & Co. in not giving the hogs sufficient food, &c. the effect, &c. and claimed damages to the amount of \$4,000, which damages were set up as a counter-claim, recoupment, or in bar of the action. The plaintiff replied denying the matters stated in the answer.

The action came on for trial at the Yates circuit in December, 1867, before Justice Welles and a jury. The plaintiff proved his sole ownership of the note by his own testimony and that of Van Cleef; and again by Mynderse recalled, and the testimony of other witnesses. The defendants attempted to rebut this proof by their own and other testimony. At the close of the proof, his honor the judge held and decided as matter of law: "That the money

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for which the note was given, was advanced by the firm of Mynderse & Co. to the defendants upon their agreement, and that whatever the rights of Mynderse and Van Cleef were as between themselves, this was a transaction by the firm, and Mynderse alone could not maintain an action on the note," and upon that ground nonsuited the plaintiff.

The plaintiff, upon a case and exceptions, moved to set aside the nonsuit and for a new trial.

Morris Brown, for the plaintiff.

E. G. Lapham, for the defendants.

By the Court, JOHNSON, J. I do not see upon what ground a nonsuit could have been granted, properly, in this case. The note upon its face was payable to the plaintiff only, or to his order. The defendants set up by way of defence in their answer, that the note belonged to the plaintiff and one Van Cleef as parties who were engaged in business under the firm name of "Mynderse & Co." and also a counter-claim in their favor against Mynderse and Van Cleef as such parties. The defendants gave evidence to show that the money for which the note was given, was advanced, and such note was given in pursuance of a contract between the defendants and Mynderse & Co. by which a quantity of hogs were to be purchased by the defendants and delivered to Mynderse & Co. to be fed and fattened for the defendants. This evidence tended to show that the money advanced and for which the note was given was the money of Mynderse & Co. They also gave evidence tending to show a breach of the contract by Mynderse & Co. and that damages had accrued to the defendants from such breach. The plaintiff, on the other side, testified that the note belonged to him exclusively and that the money advanced was his money, in which Van Cleef had no interest, and that he had none whatever in the note. In this the plaintiff was sustained by the testi-

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mony of Van Cleef. The court ruled as matter of law that the plaintiff could not maintain an action in his own name alone, to recover the amount due by the terms of the note. It is difficult to see upon what ground such a result could have been arrived at. The defendants had promised to pay the plaintiff alone, as plainly appeared upon the face of the note. The action was upon this promise, and, for aught I can see, was properly in the name of the promisee who held the obligation. If the question of the exclusive ownership by the plaintiff was of any importance it should have been submitted to the jury; at least the plaintiff should not have been nonsuited on that question. The ruling seems to have been put upon the ground that even if Van Cleef had no interest in the note, or in the money for which it was given, still no action could be maintained by the plaintiff without making him a party plaintiff. This was the ground upon which the nonsuit was asked by the defendants' counsel. It was claimed that the money was advanced upon the contract, and, therefore, the parties to the contract must necessarily unite in the action on the note. But the contract itself provides that the defendants should give their note for the loan of the \$1000, and says nothing as to whom shall be payee of such note. They have elected in part fulfillment of the agreement on their part to receive the money and promise to pay it to the plaintiff, individually, or to his order. This is not a void or voidable promise, but is perfectly valid and binding, for aught that appears in the case, and the plaintiff owning and holding the note, in his own right, was the only proper party to an action upon it.

The parties to the note and to the agreement are not the same. The note is no part of the agreement, but a separate and independent promise, made by the defendants in execution and fulfillment, *pro tanto*, of that part of the agreement on their part. The agreement is a collateral undertaking between the defendants and other par-

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ties, one of whom, only, is the plaintiff. Where the note and the agreement are between different parties, cross actions must be resorted to, and not pleas in bar or answers by way of contradiction, founded upon the agreement. (2 *Pars. on Notes and Bills*, 537. *Salmon v. Webb*, 16 *Eng. Law and Eq.* 37.) The contract has no connection with the note except as it may be regarded as forming or establishing, in part, a consideration for the making of such note. The question of consideration does not arise in the case, and the note was severed from the contract by the act and consent of all the parties, at the time it was made and delivered.

A new trial must, therefore, be granted, with costs to abide the event.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson*, and *J. C. Smith*, Justices.]

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 MARGARET ANDERSON vs. ABRAM HILL and MARGARET HILL.

That a complaint contains two distinct causes of action, which are not separately stated, is not a cause of demurrer specified in section 144 of the Code of Procedure. An error or defect of that kind is to be corrected by motion.

Where a cause of action sounding in tort is stated in the complaint, against a married woman, her husband is properly joined with her as a defendant in the action.

A complaint which states facts constituting a cause of action for an assault and battery, and also a cause of action for slander, both in the same count, and alleges that the plaintiff was greatly injured in her person and also in her character and feelings, and claims damages generally for a specified sum, is bad on demurrer.

The decision in *Brewer v. Temple* (15 *How. Pr.* 286,) overruled.

APPEAL by the defendants from an order made at a special term overruling a demurrer to the complaint.

The complaint alleged that the defendants Abram Hill and Margaret Hill are husband and wife; that they were be-

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fore the commencement of this action lawfully married, and have for several years past lived and cohabited together as husband and wife. That the said defendant, Margaret Hill, so being the wife of the said Abram Hill aforesaid, at the town of Wolcott, in the county of Wayne, on or about the 16th day of August, 1866, with loud, boisterous and abusive language, made an assault upon the said plaintiff, and then and there seized and laid hold of the plaintiff in an angry and violent manner, and with great force and violence pulled and dragged about the said plaintiff, and with a certain stick or club, and with her hands and fists, gave and struck the said plaintiff a great many violent blows and strokes on or about the face, head and divers parts of her body, and then and there, and at and during the time of the committing of the said assault and battery the said defendant, Margaret Hill, published and declared in the presence and hearing of divers good and worthy citizens, of and concerning the plaintiff, these false, scandalous and defamatory words: "You (the plaintiff meaning) are a thief; you have stolen, and will steal; you are a mean, dirty thief, and you have stolen things; you are a mean, dirty, thieving woman, and you steal every thing you can get your hands upon;" and then and there pushed and slammed about the plaintiff, and gave and struck the said plaintiff a great many violent blows, and severely beat and bruised the said plaintiff; whereby the plaintiff was greatly injured in her person, character, feelings and circumstances," and the said plaintiff therefore demanded judgment against the defendants for the sum of \$2000, besides costs and disbursements.

The defendants demurred to the complaint upon the following grounds:

First. Said complaint contains two distinct and independent causes of action which are not separately stated.

Second. Said complaint contains two distinct and independent causes of action which are improperly joined,

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to wit. a cause of action for assault and battery and a cause of action for slander.

Third. Said complaint does not state facts sufficient to constitute a cause of action against the defendant, Abram Hill.

The court overruled the demurrer, but with liberty to the defendants to answer on payment of costs.

Wm. Roe, for the appellants. I. The complaint contains two distinct causes of action: one for injury to the person, and another for injury to character, which are not separately stated. This is in violation of section 167 of the Code. It is also good ground for demurrer. (*Pike v. Van Wormer*, 5 *How. Pr.* 171. *Durkee v. Saratoga and Washington R. R. Co.*, 4 *id.* 226. *Getty v. Hudson River R. R. Co.* 8 *id.* 177. *Van Namee v. Peoble*, 9 *id.* 198. *Straus v. Parker*, *Id.* 342. *Moore v. Smith, et. al.* 10 *id.* 361. *Colwell v. N. Y. and Erie R. R. Co.* 9 *id.* 311. *Royce v. Brown*, 3 *id.* 391. *Fry v. Bennett*, 5 *Sandf.* 58.)

II. It is improper to join in the same complaint a cause of action for injury to person, and a cause of action for injury to character, and such misjoinder is ground for demurrer. (*Code*, §§ 144, 167.) It is claimed by the respondent that the causes of action in question arise out of the same transaction, and therefore may be joined in the same complaint. But in answer to that position it is urged, 1st. That an assault and battery is one transaction, and the use of slanderous language is another transaction, each having its distinct and peculiar features; and though it may be stated in the complaint that the two injuries occurred at the same point of time, yet this is rather a fiction of pleading, than a statement of facts which actually took place. Within an hour the defendant might have entered the plaintiff's house and forcibly ejected her, injured her furniture, and also assaulted her and slandered her, and, perhaps, during the same period, made sundry contracts with her; but it is submitted that it was not the intention

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of the law-makers to allow claims for damages arising out of all these matters to be blended in the same complaint, as arising out of the same transaction. The word transaction means something done, and each thing done, if possessed of distinct and peculiar attributes, is to be regarded as a separate transaction. It means in the law a contract. (2 *Bouv. Law Dic.* 595.) 2. It is submitted that if the two causes of action in question can be regarded as in any sense arising out of the same transaction, yet, they being distinct and inconsistent in their nature, they cannot be joined for that reason. Vansantvoord, in his work on pleadings, vol. 2, page 189, in speaking of the first clause of section 167 of the Code, uses this language: "They seem to establish the proposition that the subdivision under discussion, was designed to apply, generally, to that class of cases heretofore denominated equitable; and to allow such a claim to be joined with a legal claim, when both grow out of the same transaction. It will be evident on a moment's reflection that it can have but a limited application to common law cases." That this is the true intent and meaning of the first clause of section 167 of the Code, appears from the case of *Smith v. Hallock*, (8 How. 73,) and *Hulce v. Thompson*, (9 *id.* 113.) And it is believed that there is no reported case which sustains the position of the plaintiff in this action, except the special term decision of *Brewer v. Temple*, (15 *id.* 286.) And that case seems to be in direct conflict with the general term decisions of *Sweet v. Ingerson*, (12 *id.* 331,) *Springstead v. Lawson*, (23 *id.* 303,) and *Hotchkiss v. Auburn and Rochester R. R. Co.* (36 *Barb.* 600.) Again, in this same case, when it was before the court at special term, a demurrer to the plaintiff's complaint was sustained—the complaint being the same as now, except that it then embraced two counts instead of one. The complaint, as it now stands, violates two provisions of section 167 of the Code, instead

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of one: 1st. In improperly joining two causes of action, and 2d, in not separately stating them. It is submitted, therefore, that if the former complaint was bad, and the demurrer thereto properly sustained, sound reason requires that the demurrer to the complaint as it now stands, should be sustained also.

III. Within the spirit and intent of the act of 1862, with reference to married women, it is no longer proper to join the husband with the wife as party defendant for tort committed by the wife.

Jacob B. Decker, for the respondent. I. The defendants claim that there is an improper joinder of causes of action. The complaint, it is claimed, contains two counts, 1st. A count or cause of action for assault and battery. 2d. A count or cause of action for slanderous words spoken, of and concerning the plaintiff, by the defendant Margaret Hill.

II. These different counts or causes of action are properly joined; they come directly within the letter of the Code. (*See Code, Voor. 8th ed. p. 332; Code, § 167, subd. 3 and 4; 15 How. 286.*)

III. They are both causes of action in the nature of tort or wrong, the damages of each are left to the sound discretion or judgment of the jury, and they both call for the same kind of an execution. It is no doubt true that a party may bring separate causes of action if he chooses; he has the right to elect. The courts have decided that many and different causes of action, of a kindred character to those in question, may be joined—such as malicious prosecution and slander, (*Watson v. Howard, 3 Code Rep. 218.*) libel, slander and malicious prosecution. (*Martin v. Mattison, 8 Abb. 3.*) Executions for damages arising from either count would issue against the body if no property could be found.

IV. The defendants claim also that there is an improper

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joinder of parties. The assault was committed by a married woman; the slanderous words were also spoken by a married woman. Each count is in the nature of a tort. The rule I suppose to be well settled, that in all actions for torts committed by the wife, at least in the absence of the husband, the husband and wife must be joined. (*Matthews v. Fiestel*, 2 E. D. Smith, 90. *Malone v. Stilwell*, 15 Abb. 425.)

V. The argument thus far has been upon the theory that there were two distinct counts and causes of action alleged in the complaint. But this is not the case; there is but one count and one cause of action. The words alleged as slanderous, of which the counsel complains, were spoken at the very time the blows were given, and were simply a part and parcel of the conversation that transpired at the time the assault and battery was committed. This would be allowed to be proven as a part of the *res gestæ*, if they were not alleged, and we say that it is proper to allege it by way of aggravation of damages. (15 How. Pr. 286.) The complaint as amended was drawn after this case and is in its very language.

VI. If the slanderous words of which the counsel complains are improperly placed in the complaint, the remedy is by motion to strike them out as irrelevant, &c. It is no cause of demurrer.

By the Court, JOHNSON, J The first and third grounds of demurrer are not well taken. In regard to the first, that the complaint contains two distinct causes of action, which are not separately stated, it is not a cause of demurrer specified in section 144 of the Code, and the weight of authority most decidedly is that an error or defect of that kind is to be corrected by motion, and is not demurrable. As to the third ground, a cause of action sounding in tort is stated in the complaint against the defendant Margaret

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and her husband: the other defendant is properly joined in such a case. (*Code*, § 114.)

The second ground, that two distinct and independent causes of action are improperly joined, must be held also to be not well taken if the decision in *Brewer v. Temple*, (15 *How. Pr.* 286,) is good law. That is a special term decision, and with all respect for the learned justice by whom it was pronounced, I think it is not sound law.

The complaint here, as in that case, states facts constituting a clear cause of action for an assault and battery, and also a clear cause of action for verbal slander, both in a single count, and alleges that the plaintiff was greatly injured in her person; and also in her character and feelings, and claims damages generally, for the sum of \$2000. This relief is demanded for the combined injuries, and not for each injury separately. The causes of action are not separately stated, as required by the Code, and every other tolerable system or idea of pleading, but both are intermingled and woven together in a single fabric of manual and vocal tort. Causes of action for words and blows thrown into "hotchpot" and counted upon in that condition. Nothing is claimed as damages for the injury arising from the battery, as such, and nothing for the injury arising from the slander. Neither cause is claimed to have injured separately, but the injury and consequent damages spring from the union of the two wrongs. Should a verdict be rendered in the plaintiff's favor, it must necessarily be a single verdict, and it would not appear and no one could ascertain, not even the parties themselves, how much the plaintiff had been injured in person, or how much in character, nor what measure of compensation had been awarded for either injury. Surely justice ought not to be so administered, unless the statute imperatively requires it.

The Code (§ 167) prescribes what causes of action may

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be united in the same complaint, and classifies the causes. It provides that different causes of action may be so united "where they all arise out of, 1. The same transaction or transactions connected with the same subject of action; 3. Injuries with or without force to person and property; or, 4. Injuries to character," and proceeds, making seven separate and distinct classes by numbers. It then concludes: "But the causes of action so united must all belong to one of these classes, and must be separately stated." One of the causes of action in this complaint belongs to class 3, and the other to class 4. Hence there is an union of causes of action in violation of the express terms of the section. It is claimed, however, by the plaintiff's counsel, that the assault and battery, and the slander arose out of the same transaction, inasmuch as both causes originated or occurred, at the same period of time, and therefore both belong to the first class. This is what is held in *Brewer v. Temple*, (*supra*.) But it by no means follows that because the two causes of action originated, or happened, at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other, in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs, is the beating, the physical force used; while the transaction out of which the cause of action for slander springs, is not the beating, or the force used, but defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction. It has been held that a contract of warranty and a fraud practiced in the sale of a horse, at the same trade, did not arise out of the same transaction, so as to be connected each with the same sub-

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ject of action, and that a complaint containing both causes of action was demurrable. (*Sweet v. Ingerson*, 12 *How. Pr.* 331.) This was a general term decision, and of course as authority, has greater weight than that of *Brewer v. Temple*. Assault and battery and slander are as separate and distinct causes of action as any two actions which can be named. True they are both torts, but they do not belong to the same category or class, either at common law or by the Code. Indeed the Code, in express terms, enumerates and classifies them separately. The subjects of the two actions are not connected with each other. Each subject of action is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprung into existence at the same moment of time. Time has very little to do in solving the real question. The question is, did each cause of action accrue or arise out of the same transaction, the same thing done? It is apparent that each cause of action arose, and indeed must necessarily have arisen out of the doing of quite different things, by the defendant. Different in their nature, and all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain either cause of action, and they may require different answers. The same answer might not be appropriate to both. The most skilfull pleader, whose learning and experience dates back to the era before the Code, would, as it seems to me, find himself sadly at fault as to the proper answer to be made to such a complaint, unless he should find a general denial all that was necessary for a proper defense to both causes of action. But this goes upon the score of convenience merely, and is of no moment if the Code authorizes the joinder. But I am clearly of the opinion that it does not, and that the demurrer should have been sustained upon the second ground. The

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order overruling the demurrer must therefore be reversed and the demurrer sustained, with leave to the plaintiff to amend his complaint by stating one cause of action, upon payment of costs of the demurrer.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

MATILDA HALLAS vs. JAMES BELL.

In order to avoid a subsequent grant, under the statute concerning the conveyance of lands adversely possessed, the prior possession must be under claim of some specific title. The title under which the prior possession is claimed to be held must cover the premises.

If the lines under the first grant are erroneously located, so as to embrace more land than is actually covered by such grant, the subsequent grant of the land contiguous to the first is not affected, as to that portion thus erroneously included within the lines by the first grantee, though actually occupied, and claimed by him under his grant.

The "claim" to the land possessed must be "under a title," or it will not affect the subsequent grant, otherwise valid, of the disputed territory. If the prior adverse possession has continued for a period of twenty years, "under claim of title," such claim will be good against the legal title; even though a portion of the premises so possessed is not covered by the conveyance.

Where, in an action for trespass on land, it is determined by the verdict that the grant to the plaintiff did not cover the land in dispute, but that it was embraced in a subsequent conveyance from the same grantor to the defendant, the claim of the plaintiff is not "under," but outside of his title, and the defendant's grant of the disputed piece, is valid.

THIS was an action for trespass on land. The land was a small gore or strip lying in the city of Auburn, originally owned by Dyer Palmer, the common source of title, and conveyed to the plaintiff, by deed dated October 15, 1859, and subsequently to the defendant by deed dated April 14, 1864.

The action was commenced in a justice's court. The defendant interposed a plea of title, and thereupon the

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plaintiff brought an action in this court, which was tried at the circuit, before a justice of this court and a jury, and a verdict found for the defendant. The plaintiff moved for a new trial, on the judge's minutes, which motion was granted; and the defendant appealed.

Geo. Rathbun, for the appellant.

Jas. R. Cox, for the respondent.

By the Court, JOHNSON, J. This is an appeal from an order granting a new trial by the justice holding the circuit, at which the action was tried, upon his minutes. The question tried was whether the small strip, or gore of land, on which the trespass complained of was alleged to have been committed, was covered by the plaintiff's deed; and the jury, by their verdict, found that it was not, but that it had been conveyed to the defendant by the same grantor, by a deed of a subsequent date. The new trial was granted, as appears by the opinion of the learned justice who tried the action, upon the sole ground that it appeared from the evidence, without contradiction, that the plaintiff was in the actual possession of said strip, or gore, and had it enclosed, and was cultivating the same, and claiming it as part of her lot, under her deed, when the defendant took his conveyance of the adjoining lot. This, it was held, rendered the defendant's deed to that portion of his lot embraced within this gore void as against the plaintiff's deed, under the statute concerning the conveyance of lands adversely possessed. (1 R. S. 739, § 147.) This was erroneous. The Court of Appeals, in *Orary v. Goodman*, (22 N. Y. Rep. 170,) decided that in order to avoid a subsequent grant under this statute the prior possession must be under claim of some specific title. The title under which the prior possession is claimed to be held, must cover the premises. If the lines under the

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first grant are erroneously located, so as to embrace more land than is actually covered by such grant, the subsequent grant of the land contiguous to the first, is not affected, as to that portion thus erroneously included within the lines by the first grantee, though actually occupied and claimed by him under his grant. This decision of the Court of Appeals seems to have escaped the notice of counsel on both sides, as it is not referred to in their points, nor in the opinion at special term. It is, however, entirely decisive of the question here presented. The cases are precisely alike, except in the quantity of land affected by the erroneous location of the boundary line. The "claim" to the land possessed, must be "under a title," or it will not affect the subsequent grant, otherwise valid, of the disputed territory. If the prior adverse possession has continued for a period of twenty years, "under claim of title," such claim will be good against the legal title, even though a portion of the premises so possessed is not covered by the conveyance. (2 *R. S.* 294, § 82.)

It is determined by the verdict that the grant to the plaintiff did not cover the gore in question, but that it was embraced in the subsequent conveyance to the defendant. Her claim was not, therefore, "under," but outside of her title, and the defendant's grant to the disputed piece is valid. The order granting a new trial must, therefore, be reversed, a new trial denied, and judgment ordered for the defendant on the verdict.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

DAY vs. THE NEW YORK CENTRAL RAILROAD COMPANY.

Where one party is entitled to rescind an agreement, on account of the failure of the other party to perform it, he cannot rescind it in part, and affirm it as to the residue; but must affirm or disaffirm it entirely. If he affirms it in part, his duty to continue its performance remains while he so affirms it, leaving him as a means of indemnity for the defective or imperfect performance of the other party, an action for damages only, and not a diversion of a portion of the consideration agreed to be supplied by the party not in fault.

The plaintiff, by a written agreement with the defendant, agreed to erect and maintain cattle yards and pens, on his own premises, for receiving, keeping and shipping on the defendant's cars such cattle, sheep, swine, &c. as should be brought over the Great Western Railway, and to convey to the defendant the land required for the construction of the necessary railway upon it for the convenient transaction of that business, upon the consideration of the defendant's verbal agreement that it would lay down a track on the land conveyed, and that the plaintiff should permanently have the transaction of that entire business. The agreement was substantially performed by the plaintiff by conveying the land to the defendant and the erection of cattle yards and pens. Subsequently, the defendant, on the ground that the plaintiff did not complete and maintain the yards and pens in a proper and suitable condition, diverted a portion of the business stipulated for, to yards and pens erected by itself, permitting the plaintiff to receive the residue of such business.

- Held* 1. That the defendant could not, while it permitted the plaintiff to carry on the business in part, which it stipulated to supply him with, justify itself in withholding the residue from him.
2. That in doing that the defendant violated the agreement on its part, which justified the plaintiff in refusing to receive the portion he was still permitted to have.
3. That there was, therefore, a failure on the part of the defendant to perform the agreement which constituted the consideration for which the plaintiff conveyed the land and erected the cattle yards and pens. And such failure entitled him to recover the value of what the defendant had received from him, and for which it had agreed to supply him with the business specified.
4. That the defendant having obligated itself to compensate the plaintiff for the facilities he afforded the defendant in the transaction of its business in no other way than by the business it agreed to supply to him, and the agreement for that purpose being void, because not in writing, no action could be sustained by the plaintiff for depriving him of that business.
5. That a charge by which the jury were directed that they might allow the plaintiff damages for the diminished value of the use of the cattle yards and

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pens, occasioned by the refusal of the defendant to perform the contract requiring the stock to be taken to them, was erroneous.

6. That the recovery should have been limited to such damages as would compensate the plaintiff for what the defendant had received from him under the contract, which would include no part of the losses sustained by him on account of the defendant's omission to furnish the business it agreed to supply him with.

THE plaintiff in this action claimed to recover the value of certain lands conveyed to the defendant in the year 1855, together with the expenses of building and maintaining cattle yards and pens erected upon his own land, to accommodate the defendant in the shipment of cattle, swine, sheep, &c. from his land, upon the cars of the defendant. The land upon which the cattle yards and pens were to be, and afterwards were, erected by the plaintiff, adjoined that sold and conveyed to the railroad company. The agreement of the plaintiff to erect and maintain the cattle yards and pens was in writing, and that as well as the conveyance of the land itself, the plaintiff testified, were made and executed by him in consideration of the defendant's verbal agreement that it would lay down a track over the land conveyed to it by the plaintiff, upon which its cars, as well as the cars of the Great Western Road, terminating at Suspension Bridge, where such land was situated, could be run to the yards and pens of the plaintiff. And the plaintiff agreed to erect and maintain, and would take the cattle business of the defendant to his farm, and that he would receive and load the cattle there. After the plaintiff had erected, and for a time maintained such yards and pens, the defendant erected yards and pens of its own, near the village of Suspension Bridge, at which a portion of the business was afterwards transacted and carried on. From that time the business was divided between the yards and pens of the plaintiff and those of the defendant. The plaintiff objected to this division of the business, and after making several

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ineffectual efforts for its correction he finally declined to carry it on any longer in that manner, and brought this action to recover indemnity for the losses he had incurred by the omission of the defendant to take the entire cattle business to his farm. The jury found a verdict in his favor for the sum of twenty-five hundred dollars. And the defendant moved for a new trial on a case made at the special term, and from the order denying that motion appealed to this court.

John Ganson, for the appellant.

G. D. Lamont, for the respondent.

By the Court, DANIELS, J. When this case was before this court, upon a former occasion, it was held that the contract which the plaintiff maintained that the defendant had made with him, was one which, by its terms, permanently entitled him to the business to be transacted. And as such it was within the statute of frauds, and void because it was not in writing. (*Day v. New York Central Railroad Co.*, (31 Barb. 548.) That conclusion must, therefore, be assumed to be so far the settled law of this case in the present disposition of it. The result of that decision is that the plaintiff agreed to erect and maintain the cattle yards and pens on his own lands for receiving, keeping and shipping on the defendant's cars, such cattle, sheep, swine, &c. as should be brought over the Great Western Railway, and to convey to the defendant the land required for the construction of the necessary railways upon it for the convenient transaction of that business, upon the sole consideration of the defendants' void agreement that he (the plaintiff) should permanently have the transaction of that entire business. It was expected by the parties that the emoluments of that business would sufficiently compensate the plaintiff for the value of the land he was

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to convey, and the expenses he would be subjected to in erecting and maintaining the cattle yards and pens. And the agreement of the plaintiff was substantially performed by him, when he conveyed the land to the defendants, and afterwards erected the cattle yards and pens.

Evidence was given, upon the trial, tending to prove that the plaintiff did not complete and maintain the yards and pens in a suitable condition for the convenient and proper transaction of the business to be done in them, which, if true, would have justified the defendant in withdrawing the business entirely from his premises. But the defendant did not act in that manner. It still permitted him to receive a portion of the business stipulated for, while it diverted the residue to the yards and pens erected and maintained by itself. If the complaint of the defendant concerning the manner in which the plaintiff carried on the business, was well founded in fact, it would have justified the defendant, even though the agreement was legally obligatory, in refusing to perform it on its part. The defendant would have been secured under that state of the case, with the election of either continuing or discontinuing the performance of the stipulations resting upon it by means of the agreement. But it would have to do one or the other. It could not justify itself on that account, in diverting a portion of the business from the plaintiff, while it secured him the performance of the residue. For permitting him to continue in such performance, would, while that was done, constitute a waiver of the obligation arising upon the defective manner in which the plaintiff performed that part of the agreement resting upon him. Where one party is entitled to rescind an agreement, on account of the failure of the other party to perform it, he cannot rescind it in part and affirm it as to the residue; but must affirm or disaffirm it entirely. If he affirms it in part, his duty to continue its performance remains while he so affirms it, leaving him as a means of

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indemnity for the defective or imperfect performance of the other party, an action for damages only, and not a diversion of a portion of the consideration agreed to be supplied by the party not in fault. For this reason, the defendant, while it permitted the plaintiff to carry on the business in part, which it stipulated to supply him with, cannot justify itself in withholding the residue from him. In doing that it violated the agreement upon its part, which justified the plaintiff in the refusal to receive the portion he was still permitted to have. There was, therefore, a failure on the part of the defendant to perform the agreement which constituted the consideration for which the plaintiff conveyed the land and erected the cattle yards and pens. And that failure entitled him to recover the value of what the defendant had received from him, and for which it had agreed and failed to supply him with this business. It is not the case of a rescission of the agreement by the plaintiff, in which he would be bound to restore, as far as he might be able to do so, whatever benefit had been directly secured to him by the partial performance of the agreement by the defendant. But the case presented is one where the law allows him to recover the value of whatever the defendant has derived from him by his performance of the agreement, and which performance is to remain undisturbed, on account of its omission and refusal to perform what was the consideration for that performance. The equivalent which the defendant agreed to give cannot be awarded either directly or by way of damages, because the agreement providing for it is void on account of the omission to reduce it to writing. All that the courts can do in such a case is to allow the party not in default to recover the value of that which in the expectation that the agreement would be performed he has transferred to the defaulting party. This he may do, not on the ground that he rescinds the agreement which he has performed on his part, but on the ground that the law will imply a promise

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on the part of the defaulting party to pay the reasonable value of what he may have received, where his own stipulations are inoperative and void by reason of legal informality in the manner in which they were made. No legal obstacle would stand in the way of the party who has performed such an agreement, which would prevent him from rescinding it, and recovering what he may have parted with on the faith of it, where the other party could by that act be placed in the same situation he was in when the agreement was made. But he is not ordinarily obliged to take that course. To do that he would be required to restore what he himself had received by the partial performance of the other party. This, however, he is not required to do. The agreement to compensate him being void, he may, under the promise which the law will imply in his favor, recover such sum as together with the benefit secured to him by the partial performance of the defaulting party will remunerate him for the reasonable value of what that party may have received through his own performance of the terms of the void agreement. This principle is not only founded in good sense, but it also has the sanction of several well considered and well established authorities. (*Gillet v. Maynard*, 5 John. 85. *King v. Brown*, 2 Hill, 485. *Peck v. Burr*, 10 N. Y. Rep. 294. *Erben v. Lorillard*, 19 id. 299.) And it clearly distinguishes this class of cases from those relied upon by the counsel for the appellant, where an actual rescission of the agreement must be made by a restoration of what the party rescinding it may have received, before he can be permitted to recover the consideration that may have been parted with under it. They are cases where the action proceeded for the specific thing which the party claimed to be in default had received from the other party. The action in those cases was for the recovery of the consideration, while in this it is to recover the value of it in money. The same substantial results may follow in each class of cases, but

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still there is a clear and well marked legal distinction between them. One proceeds upon a rescission of the contract, the other upon the affirmance of it as far as its performance has extended, united with the promise which the law implies against the party benefited to pay for that which he has received by means of such performance.

In this case, all that the railroad company received under the agreement from the plaintiff was the land which he conveyed to it. For as the court very properly held at the trial, it could not insist upon the performance of his covenant to build and keep the cattle yards and pens in repair, after it had withheld from him the consideration upon which that covenant was entered into. That was to be done for the accommodation of the business which the company was to take there, and it could be required no longer than the company supplied the plaintiff with the business it was contemplated he was to carry on by means of such yards and pens.

The yards and pens themselves were erected on the plaintiff's own land, and were owned by him. The defendant had no right or interest in them whatever, beyond the plaintiff's obligation to appropriate them to the transaction of the business for which they were designed, as long as it supplied him with that business. When the defendant ceased to do that, even that obligation was at an end. And the yards and pens were the absolute property of the plaintiff, while these yards and pens were made to accommodate the necessities of the defendant's business, the business to be carried on in and by means of them, was to be that of the plaintiff. And all its gains and emoluments belonged to him. It is true they secured important if not indispensable facilities to the defendant and the great Western Railway Company in the transportation of live stock, but the defendant obligated itself to compensate the plaintiff for such facilities in no other way than by the business it agreed to supply to him. And the

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agreement made for that purpose was void because not in writing. Under these circumstances no action can be maintained by the plaintiff for depriving him of that business, which was the means by which he expected to be compensated for the expenses incurred in erecting and maintaining the cattle yards and pens. In no other way was it contemplated that the defendant should reward him for the benefit secured to it by the plaintiff's performance of the contract in this respect. The entire risk of the investment, as well as the losses arising out of it, or dependent upon the defendant's performance of the stipulations resting upon it, was exclusively that of the plaintiff. If, from either cause, losses were experienced, they were solely those of the plaintiff, because he imposed no binding obligation on the defendant to protect him against them, either in whole or in part. To subject the defendant to such liability required some stipulation on its part of a valid and binding character, which it has failed to perform. And no stipulation relating to that is to be found outside of that part of the contract which was void by the statute of frauds. For this reason that part of the charge by which the jury were directed that they might allow the plaintiff damages for the diminished value of the use of the cattle yards and pens, occasioned by the refusal of the defendant to perform the contract requiring the stock to be taken to them, was erroneous. It virtually gave the plaintiff such damages as he sustained by reason of the non-performance of the contract on the part of the defendant, so far as such non-performance resulted in diminishing the value of the use of the yards and pens. And the right to recover them is dependent entirely upon the validity of this part of the agreement. The recovery of such damages requires for its support a valid, binding agreement to supply the plaintiff with the business which it was agreed he should have to do at these yards and

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pena. And no such agreement exists in the case. These damages arose directly out of the breach of the defendant's contract, which this court has already held to be entirely void so far as it remained unperformed. The defendant received nothing from the plaintiff for which such damages can be given by way of compensation. The sole intent and object of them was indemnity for losses arising out of a failure on the part of the defendant to fulfill its void engagements. The recovery should have been limited to such damages as would compensate the plaintiff for what the defendant had received from him under the contract, which would include no part of the losses sustained by him on account of the defendant's omission to furnish the business it agreed to supply him with.

The order denying a new trial should be reversed, and a new trial directed, with costs to abide the event

[ERIE GENERAL TERM, November 18, 1867. *Grover, Marvin, Daniels and Davis*, Justices.]

WILBER vs. SISSON.

II

Where the owner of land agrees to pay the occupant, for working the same on shares, the value of a certain portion of the crops and produce, the parties are tenants in common of the crops, &c. In such a case the occupant does not become a tenant, and the agreement between him and the owner is not to be construed as a lease.

Where the agreement is of such a nature as to constitute a tenancy, as distinguished from an occupancy to work the land on shares, there the products become the property of the tenant, and he can use, sell or dispose of them as he may choose.

G. agreed with C. to work the dairy and land of the latter for one year, from the 1st of March 1865, upon the terms mentioned in a written agreement between them. For the use of the farm and dairy he was to deliver to C. 9600 lbs. of good merchantable cheese, made at a specified cheese factory. The agreement contained no words by which the premises and the cows were leased and demised to G. nor any agreement on the part of G. to pay any thing for their use, by way of rent, but began by declaring that G. agreed "to work" the dairy and land of C. on the "following terms." It then

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stated as a part of such terms, that C. should furnish good dairy cows to the number of fifty; that G. should work the land, and that it should be occupied by the cows. The cows were to be at the risk of G. during the year, and if any of them should be injured or die, he was to pay the damages occasioned by such injury, and to replace such as should die. He was to work the land in a good, faithful, farmer-like manner, and raise all the grain, grass and corn that he could, with good faithful tillage of the land. He was to provide the seed-corn and deliver half the crop raised from it to C. The crops were to be fed to the cows on the farm, his own team and his family, and he was prohibited from selling any part of the crops without C.'s consent. Whatever hay or other fodder was left in the spring, was to be the property of C. and if it fell short, during the winter, C. was to supply the deficiency.

Held that this was not an agreement for the leasing of the premises to G. constituting a tenancy, but was an employment of the latter to work the land and carry on the dairy upon shares.

The agreement mentioned the cheese which C. was to receive as his part of the cheese, and this the occupant agreed to deliver to him, free of charge, at whatever place it should be contracted to be delivered at; and it was provided that C.'s part of the cheese should commence to be made the 15th of May, 1865; that he should have a certain number of pounds for his part; that G. should pay the cheese factory for making C.'s part of the cheese; and that all the rest of the cheese and butter should be G.'s. *Held* that these stipulations, taken together, showed an intention on the part of the parties that the cheese should be manufactured from the milk of the dairy, and that the quantity to be delivered to C. was to be his part or share of the aggregate products. And that, so construed, they harmonized with the other provisions and stipulations indicating that the farm and dairy were to be carried on by G. on shares.

Held, also, that the agreement, by providing that G. should own only the residue of the cheese, in effect excluded him from owning any part of C.'s share. That it was competent for the parties so to agree, and they having done so, it necessarily left C. the owner of all that was produced by the dairy, which it was not provided that G. should have.

THIS action was brought to recover the sum of \$400.19, which the defendant had received as the proceeds of the sale of a quantity of cheese manufactured and sold by the First Collins Cheese Factory. The plaintiff claimed to recover the money as the assignee of Peter Gamel, to whose credit the money stood on the books of the factory. Whatever right he had to the money, was in some manner,

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though how does not appear by the case, derived from his brother John Gamel. The defendant claimed to hold the sum of \$349.13 of the money as the property of Ansel F. Conger, who claimed it under the terms of agreement made between himself and John Gamel. The court directed a verdict for the plaintiff, to which the defendant excepted. He also excepted to such direction so far as it directed a recovery for any greater sum than the difference between the amount claimed by Conger, and the whole amount of money claimed by the plaintiff in this action. The jury rendered a verdict for the plaintiff for the sum of \$445. And the exceptions taken were ordered to be first heard at the general term.

C. C. Torrance, for the plaintiff.

John Ganson, for the defendant.

By the Court, DANIELS, J. The plaintiff derived whatever right he has to the money in controversy from John Gamel, under the agreement made by the latter with Ansel F. Conger; and the defendant, as the treasurer of the cheese factory, under the authority conferred by the same agreement, insists upon holding so much of it as is really in controversy, for Conger. By the course of business adopted at the factory, the money received from the sale of cheese was paid to the person to whom it stood credited upon the books and to whom the check or account for it was issued. But the evidence tended to show that Conger not only did not assent to the moneys in question being disposed of in that manner, but beyond that he positively dissented to such a disposition being made of them. No right to the moneys can be derived from the custom prevailing at the factory, so long as that custom was not assented to by Conger. Besides that, if the money belonged to Conger, a custom by which he could be deprived of it

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and another person allowed to receive and hold it, would be unreasonable and unjust, and, therefore, invalid. The rights of these parties depend upon the construction which should properly be placed upon the agreement between John Gamel and Ansel F. Conger, unaffected by the manner in which the business of the cheese factory was transacted. By this agreement John Gamel agreed to work the dairy and land of Conger from the 1st of March, 1865, for the period of one year, upon the terms therein mentioned. And for the use of the farm and dairy he was to deliver to Conger nine thousand six hundred pounds of good merchantable cheese, made at the cheese factory in Collins, managed by George Sisson and others. The milk from the dairy was taken to the factory referred to, and it was there manufactured into cheese, and from the sale of a part of such cheese the moneys in dispute were received. This cheese, the defendant claims, was, by force of the agreement, the property of Conger, to the extent of the money in controversy, and that he should be permitted to pay the money to Conger, he having claimed and demanded it before the action was commenced.

In construing this agreement the principal object to be attained is to ascertain what was the intention of the parties concerning the title to the cheese that should be manufactured from the milk of the dairy, and that must be done by considering the terms they have made use of in making their agreement, the subject matter to which it related, and the circumstances under which they acted in making it. Agreements of this description are somewhat peculiar, and it has, therefore, been said that in the construction of them courts should not tie themselves to mere words. "The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants than tenants, each party taking an interest as common owners in the crops

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and other products as they accrue, by way of compensation to the owners for the use of their farm and the occupiers for their labor." (*Per Cowen J. in Putnam v. Wise*, 1 *Hill*, 247.) And accordingly where the owner agreed to pay the occupant for working a farm on shares, the value of one half of all the grain, butter and net proceeds of the sheep and hogs produced from the premises, it was held that they were tenants in common in the crops. (*Tanner v. Hills*, 44 *Barb.* 428.) In this class of cases the rule is well settled that the occupant does not become a tenant, and that the agreement between him and the owner is not to be construed as a lease. (*Caswell v. Districh*, 15 *Wend.* 379. *Dinehart v. Wilson*, 15 *Barb.* 595.) Where the agreement is of such a nature as to constitute a tenancy, as distinguished from an occupancy to work the land on shares, there the products become the property of the tenant, and he can use, sell or dispose of them as he may choose. The plaintiff claims that such was the character of the relation created by the agreement made in this instance, while the defendant insists that it was simply an employment of the occupant to work the land and carry on the dairy on shares.

The general tenor of the agreement is not that of a lease. It contains no words by which the premises and the crops are leased and demised to the occupant, and it is as entirely free from any agreement on the part of the occupant to pay anything for their use by way of rent. Instead of containing any words by way of leasing the premises and the cows, it begins by declaring "That the said John Gamel agrees to work the dairy and land of the said Ansel F. Conger on the following terms." Then it proceeds to state, as a part of such terms, that Conger should "furnish good dairy cows," to the number of fifty, and that Gamel should work the land, and that it should be occupied by the cows. These cows were to be at the risk of Gamel during the year, and if any of them should be

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injured or unavoidably die, he was required to pay the damages occasioned by such injury, and to replace such as should die. He was to work the land in a good, faithful farmer-like manner, and raise all the grain, grass and corn that he could, with good faithful tillage of the land. He was to provide the seed-corn and deliver half the crop raised from it to the owner of the land. The seed for the other crops were to be provided by the occupant, and the crops themselves were to be fed to the cows on the farm, his own team and his family, and he was prohibited from selling any part of the crops without Conger's consent. The hay and grain was required to be well secured; the corn stalks foddered out in good shape to the cows, and no other stock besides these cows was to be kept on the premises, except a pair of horses. Whatever hay or other fodder was left in the spring was to be the property of Conger, and if it fell short during the winter he was to supply what was deficient, at his own expense. These are the provisions contained in the agreement relating to the occupancy, use and management of the property. And they are certainly very far from indicating any intention on the part of the parties to it that the property should be leased to the occupant. The stipulations that the occupant should pay all the taxes but the county tax, and should build certain fences and keep the premises in repair, are as consistent with one relation as they are with the other, and are entitled to but slight, if any, consideration in the disposition which should be made of the case.

The compensation which the owner of the property should receive for the use of it, was to be one half the corn raised, one hundred bushels of apples from the orchard, and nine thousand six hundred pounds of cheese. There is no specific stipulation contained in the agreement that this cheese was to be manufactured from the milk given by these cows, or that any part of the milk should

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be taken to the factory at which the cheese was to be made. But still it is plainly manifest from the tenor of the agreement itself and the stipulations concerning the cheese, that it was intended by the parties that it should be. And the stipulation that the cows should be at the occupant's risk during the year, is in no way in conflict with this intent. For if any of them were to unavoidably die, the agreement provided that the occupant should replace them with others equally as good, which would not be performed by replacing them at the end of the year. The fair import of the agreement upon this subject is, that they should be replaced at the time when the necessity for doing so should arise. Otherwise the object which the parties intended to accomplish by means of the agreement, which was to carry on the business of a dairy, would, so far as there might be default in that respect, be defeated. The obligation, which by this part of the agreement was intended to be imposed on the occupant, was to keep the number and quality of the cows good during the period for which it was made, which would furnish the occupant with the milk required for manufacturing the cheese. As the business which was to be carried on by the occupant was that of a dairy, a part of which at least is understood to be the manufacture of cheese, that circumstance may not improperly be considered as confirming the conclusion more directly indicated by the tenor of the agreement and the particular clause relating to that subject, that a portion of the milk was intended to be taken to the cheese factory, there to be manufactured into cheese. And the subsequent conduct of the occupant in taking it to the factory for that purpose tends in some measure to show that such was his understanding of the terms of the agreement. But this, though worthy of consideration, of course would not be controlling upon him or others who claim title under him.

Besides the scope and tenor of the agreement indicating

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that this business was to be carried on upon shares, it contains particular stipulations and statements clearly showing that such was the intention of the parties concerning the use that should be made of the milk produced by the dairy. For in this respect it assumes that the cheese which Conger was to receive was to be made from such milk, and that he was to receive it, not as rent, but as his portion of the products of the dairy. Upon this subject the agreement mentions the cheese which he was, by its terms, to have from the occupant, as his part of the cheese. And this the occupant agreed to deliver free of charge to him, at whatever place it should be contracted to be delivered at. In addition to that, the agreement provided that Conger's part of the cheese should commence to be made the 15th of May, 1865; that he should have nine thousand six hundred pounds for his part, and that the occupant should pay the cheese factory for making Conger's part of the cheese. And it is added to that, that all the rest of the cheese and butter should be Gamel's. These stipulations are very clear and certain, and disclose the purpose of the parties to have been that Conger's share of the cheese was to be manufactured from the milk of this dairy, and they render the previously uncertain agreement of the occupant to deliver cheese, fixed and definite. When the different parts of the agreement relating to this subject are taken together they very clearly show that no other intention could have been entertained than that the cheese should be manufactured from the milk of this dairy, and that the quantity to be delivered to Conger was to be his part or share of the aggregate products. The terms they have used to distinguish it as his share, or part, are consistent with no other purpose. And so construed, they harmonize with the other provisions and stipulations indicating that the farm and dairy were to be carried on by Gamel on shares. If that had not been the object, it is difficult to see why the agreement should have

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provided that Gamel should work the farm ; that it should direct the manner in which it should be worked, and the disposition that should be made of the crops ; that the corn and apples should be divided ; that Conger should be liable to supply hay so far as it might be deficient, and have the surplus if there should prove to be any ; that the cheese he was to receive was to be his part or share of the cheese ; and that Gamel should own the rest of the cheese and butter ; which clearly implied that he was not to own that which Conger was to receive.

The fact that Conger was to receive a fixed and specified quantity does not impair his rights as owner of it. For the agreement, by providing that Gamel should own only the residue, as it does in effect, excluded him from owning any part of Conger's share. It was competent for the parties so to agree, and having done so it necessarily left Conger the owner of all that was produced by the dairy, which it was not provided that the occupant should have. In a case already mentioned, Cowen, J. remarked, that if "the rent consisted in any amount of grain and wool, in bushels or pounds, without saying from the farm, the owners could have claimed no property in either till delivery, or at least till tender made." (1 *Hill*, 244.) Very plainly intimating that if it were to come from the farm, the case would be the same as though the quantity or share to be received by the owner had been left indefinite in amount. And substantially to that effect was the ruling made in the cases of *Chamberlin v. Shaw*, (18 *Pick.* 278 ;) *Lewis v. Lyman*, (22 *id.* 437.)

The verdict in this case should be set aside and a new trial ordered, unless the plaintiff will stipulate to reduce it to the sum of \$53.06, and interest thereon from the commencement of this action.

[ERIE GENERAL TERM, September 7, 1868. *Marvin, Daniels, Davis and Barker, Justices.*]

ELIZA F. LARKIN vs. PETER J. MANN and ABRAM MANN.

53	267
126a	471
53b	267
f186a	607

A. Testator, by the 5th item of his will, gave and bequeathed to his daughter, E. \$200, to be paid by his executors in two years after his decease. By the 13th item of such will, the testator charged upon the real estate devised to his two sons, (the defendants,) certain legacies, including the above, in manner following: "And I do hereby declare the legacies mentioned and contained in the 1st, 2d, 3d and 4th of the above mentioned bequests, and the \$200 contained in the 5th bequest, a lien and charge upon the real estate herein-after devised to my said two sons, viz. one half thereof on the share of the real estate devised to each son, and the said real estate is devised as aforesaid subject to the payment of said legacies, as aforesaid." The testator then disposed of all the remainder of his estate as follows; "I do give and bequeath to my two sons P. and A. in equal proportions, all the remainder of my real and personal estate and choses in action not hereinbefore devised; to have and to hold to themselves, their heirs and assigns forever." The testator devised to his said two sons considerable real estate, a portion of which was devised to them jointly, and the residue in severalty. And they, after his death, held, possessed and enjoyed such real estate.

- Held* 1. That the personal estate did not constitute a primary fund to satisfy the legacy to E. of \$200. (1.) Because it was all disposed of by the will. (2.) Because the legacy was expressly charged upon the real estate devised to the defendants, who were by the will charged with the payment of the legacy.
2. That the defendants, by accepting such real estate under the will, assumed the burden imposed, and thereby became liable personally to pay the legacy in question.
3. That an action by E. against the two sons of the testator, in which the relief sought was that the defendants might be adjudged and decreed to pay the said legacy of \$200, and for other and further relief, could be sustained against both the defendants; the legacy being entire, and the defendants being, by the will, in effect, directed to pay the same. And that the plaintiff was not obliged to sever such legacy and bring a separate action against each defendant, to recover the same.
4. That although the testator directed that the legacy of \$200 to E. should be paid to her by his "*said executors*," &c. yet that it was evident from the provisions of the will that he intended to charge the defendants personally, and that the word "executors" was merely descriptive.
5. That a judgment directing each defendant to pay an equal share of the legacy, with costs, and in default of such payment, that the real estate be sold to satisfy the same, was proper, the action being in equity.

THIS is an appeal by the defendants from a judgment rendered in favor of the plaintiff on the 4th day of October, 1867, for \$304 54, damages and costs.

Larkin v. Mann.

N. P. Hinman and H. Krum, for the appellants.

R. Brewster, for the respondent.

By the Court, INGALLS, J. This action is brought by the plaintiff to recover a legacy of \$200 bequeathed to her in and by the will of her father, Peter Mann. The will was executed in due form of law on the 5th day of April, 1857, and a codicil was made and annexed thereto April 11, 1859. The testator died August 17, 1864, and the will and codicil were admitted to probate on the 17th day of October, 1864. The legacy in question is bequeathed to the plaintiff in the 5th item of the will, as follows: "5th. I do give and bequeath unto my daughter Eliza F. Mann, the sum of \$200, to be paid to her, her heirs or assigns, by my said executors, in two years after my decease." By the 13th item of said will the testator charged upon the real estate devised to his two sons, the defendants, certain legacies, including the one in question, in manner following: "And I do hereby declare the legacies mentioned and contained in the 1st, 2d, 3d and 4th of the above mentioned bequests, and the \$200 contained in the 5th bequest, a lien and charge upon the real estate herein-after devised to my said two sons, viz. one half thereof on the share of the real estate devised to each son, and the said real estate is devised as aforesaid, subject to the payment of said legacies as aforesaid." By the same item of said will the testator disposed of all the remainder of his estate as follows: "I do give and bequeath to my two sons, Peter J. and Abram, in equal proportions, all the remainder of my real and personal estate and choses in action not hereinbefore devised. To have and to hold to themselves, their heirs and assigns forever." The testator, by said will, devised to the defendants considerable real estate, a portion of which was devised to them jointly, and the residue in severalty. Upon the trial the will was read in

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evidence, and for additional facts the parties relied upon the admissions contained in the pleadings. The plaintiff, among other facts, charged in the complaint as follows: "That ever since the death of the testator the defendants have held, possessed and enjoyed the real estate devised to them as aforesaid, by virtue of said last will and testament, and have sold and conveyed certain portions thereof." The defendants in their answers do not deny that they received under the will real estate, but allege, in substance, that the portion thereof which was devised to them jointly, was by the testator after the execution of the will, and on the 9th of June, 1862, conveyed to them by deed, and whatever real estate they received under the will was so received and held by them in severalty, and not jointly or in common. The deed was not put in evidence upon the trial, nor is it alleged in the pleadings what its nature or form is, nor but that it harmonizes with the devise in the will. The cause seems to have been rather hastily, and perhaps imperfectly, presented upon the facts; yet I think enough appears to justify the judgment pronounced. It is very clear that the personal estate did not constitute a primary fund to satisfy the legacy in question. 1st. Because it was all disposed of by the will. 2d. Because the legacy was expressly charged upon the real estate devised to the defendants, who were by the will charged with the payment of the legacy. (*Hoes v. Van Hoesen*, 1 N. Y. Rep. 120. *Kelsey v. Western*, 2 id. 501. *Willard's Eq. Juris.* p. 488. *Hallett v. Hallett*, 2 Paige, 15.) The provision of the will charging the legacy upon the estate is unequivocal. It not only declares the legacy to be a lien and charge thereon, but devises the real estate to the defendants *subject to the payment thereof*.

Again, the defendants, by accepting such real estate under the will, which, from the facts proved, they should

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be held to have done, assumed the burden imposed and thereby became liable to pay the legacy in question. In *Willard's Equity Jurisprudence*, (p. 489,) the author says: "But where the real estate is devised to the person who, by the will, is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, *although the devisee is also executor, or is the residuary legatee of the personal estate.*" Again, on the same page: "If, however, the devisee accepts the devise, he becomes personally liable for the legacies, notwithstanding which the legacies are an equitable charge upon the real estate." (*See also Harris v. Fly*, 7 Paige, 421; *Kelsey v. Western*, 1 N. Y. Rep. 501; *Gridley v. Gridley*, 24 *id.* 130.) Thus, we perceive, the legacy was not only charged upon the real estate, thereby creating a lien, but the defendants became liable personally to pay the same, having accepted the real estate devised to them, charged with the burden.

The summons in this action is for relief, and the complaint demands judgment that the defendants be adjudged and decreed to pay the said legacy, and that the plaintiff have such other or further relief as the nature of the case requires. No question was raised, upon the trial, that the complaint was not adapted to the nature of the relief sought; or that it was insufficient in the statement of facts. The defendants having answered, and participated in the trial, the court was authorized to pronounce such judgment as the facts alleged in the pleadings and proved upon the trial justified; even though the relief demanded in the complaint was insufficient. (*Code*, § 274. *Emery v. Pease*, 20 N. Y. Rep. 62.)

We are also of opinion that the action was properly sustained against both defendants, and that the judgment is correct. The legacy is entire, and the defendants are by the will, in effect, directed to pay the same.

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It is true the testator in making this bequest uses the following language: "5th. I give and bequeath unto my daughter, Eliza F. Mann, the sum of two hundred dollars, to be paid to her, her heirs or assigns, *by my said executors,*" &c. But it is very evident from the provisions of the will that he intended to charge the defendants personally, and that the word "executors" was merely descriptive. The fact that the testator, when he came to declare the extent of the lien upon the real estate devised to the defendants, directed that one half of the legacies should be charged upon the share of the real estate devised to each son, indicates merely that he intended to define the extent of the incumbrance upon the real estate devised to them, *as between themselves*, in case a sale of any part of the real estate should become necessary to satisfy the legacies, or any of them. We are disinclined to accept the theory that the plaintiff was compelled to sever this legacy of two hundred dollars, and bring a separate action against each defendant, to collect the same. Such was not the intention of the testator, as evidenced by the will. Nor, in my judgment, does the law require such course to be pursued, when the rights of all the parties can be properly adjusted in this equity action. As between themselves and the legatees, the defendants are chargeable jointly with the payment of the legacies, and they are left to adjust the equities, as between themselves, or have it accomplished in this action. The judgment in this action seems to be framed with a view to protect each defendant; for it provides, among other things, that each of the defendants shall pay an equal share of the legacy, with costs, and in default of such payment, that the real estate be sold to satisfy the same. This being an equity action, the court was authorized to render such a judgment as was just and agreeable to the facts alleged and proved. And I do not think that power has been transcended in

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this case. Two actions should not be encouraged when adequate relief can be obtained in one; as the law abhors multiplicity of suits. (*Towner v. Tooley*, 38 Barb. 598. *Hallett v. Hallett*, 1 Paige, 15.)

The judgment should be affirmed, with costs.

[ALBANY GENERAL TERM, December 7, 1868. *Ingalls, Hogeboom and Peckham*, Justices.]

BILLINGS vs. MEIGS and others.

Although, where there is a general partnership, and one of the firm borrows money in the name and upon the credit of the firm, the lender may recover against the firm, if he has acted in good faith, notwithstanding that the money was ultimately misapplied by the partner borrowing it; yet if the lender knows, at the time of the loan, that it is the intention of the borrower to apply it to his individual use, and afterwards it is so applied, he cannot recover from the firm; or if he has good reason to believe from surrounding circumstances, that such is the intention of the borrower, he is put upon inquiry to ascertain from the other members of the firm whether the loan is sought to be made with their consent and for their use.

So when a banker has the funds of a firm deposited with him for the purpose of its especial business, and when he knows that one of the firm is engaged in individual speculations, and he transfers these funds to the separate account of this member, and with knowledge that the latter appropriates the funds to such speculations, the banker is liable for the funds thus misapplied, unless they first assure him of their consent.

APPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiff, against the defendants, to recover a balance alleged to be due to the firm of B. F. Carver & Co., of which firm the plaintiff was a member, on an account kept by that firm with the defendants.

The case was tried before a referee, who found the following facts:

First. That the plaintiff did, on the 24th day of October, 1860, form a copartnership with Benjamin F. Carver and Courtland G. Babcock, to transact the business of banking

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at Chicago, in the State of Illinois, under the name and style of "B. F. Carver & Company," and that the said copartnership continued in the transaction of such business until the 1st day of May, 1862, when the same was dissolved.

Second. That the defendants were, prior to October, 1860, and until December 31, 1861, copartners, doing business as bankers and brokers, in the city of New York, under the name and style of "Meigs & Greenleaf."

Third. During the continuance of the said copartnership of B. F. Carver & Company, the said firm remitted, from time to time, to the firm of Meigs & Greenleaf, government and state securities, to be sold at the city of New York for them and on their account. And the said firm of B. F. Carver & Company also remitted to, and deposited with said Meigs and Greenleaf, divers sums of money to be drawn against by said B. F. Carver & Co. as they should have occasion.

Fourth. The avails of the sales of the said government and state securities, and the amount of money so as aforesaid deposited with said Meigs & Greenleaf, amounted in the whole to \$641,326.31.

Fifth. That during the continuance of the copartnership of B. F. Carver & Company, the said firm drew and received from the firm of Meigs & Greenleaf the sum of \$627,769.58, leaving the sum of \$13,536.74, on the 1st day of October, 1862, in the hands of said firm of Meigs & Greenleaf, belonging to the firm of B. F. Carver & Company, subject and liable to be paid on demand.

Sixth. That the said sum of \$13,536.58, was, on or about the 5th day of October, 1862, demanded by the plaintiff's firm, of B. F. Carver & Company, of the defendants, but has not been paid.

Seventh. Benjamin F. Carver and Courtland G. Babcock have assigned their interest in said firm of B. F. Carver & Co. and the property and assets thereof to the plaintiff.

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The referee found, as conclusion of law: That the defendants were indebted to the plaintiff in the sum of \$13,536.74, with interest from the 5th day of October, 1862, which amounts to \$3,432.28; and that the plaintiff was entitled to judgment for the said amount, to wit. \$16,969.02, besides the costs of this action.

The defendants appealed from the judgment so entered.

E. E. Anderson, for the appellants.

John N. Whiting, for the respondent.

By the Court, CLERKE, P. J. In the additional findings of the referee, he finds, as matters of fact, that the various sums, which the defendants claim they had a right to appropriate to the individual use of B. F. Carver, were transmitted in the regular course of their business, from Chicago to the defendants, by B. F. Carver & Co. composed of the said B. F. Carver, Coddington Billings and Courtland G. Babcock, and that this was done without the knowledge and consent of Billings and Babcock. The plaintiff's firm were bankers in Chicago, dealing in money and government bonds, and loans and discounts, and nothing else. The speculations in stocks and the other transactions of B. F. Carver, individually, of which there is sufficient in the evidence to infer that the defendants were cognizant, were frauds upon the plaintiff's firm, having been entered in the defendants' accounts as part of their transactions, when it was evident that these transactions were not in the ordinary course of their business. When the defendants witnessed this misappropriation of the funds of the firm, they were at least put upon inquiry to ascertain from the other members of the firm whether they consented to the course, in which Carver was individually engaged, and whether the funds of the firm should be applied to his individual transactions. Undoubtedly, where there is a general partnership, and one of the firm borrows money

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in the name and upon the credit of the firm, the lender may recover against the firm, if he has acted in good faith, notwithstanding that the money was ultimately misapplied by the partner borrowing it. But, if the lender knows, at the time of the loan, that it is the intention of the borrower to apply it to his individual use, and afterwards it is applied, he cannot recover from the firm; or, if he has good reason to believe from surrounding circumstances that such is the intention of the borrower, he is put upon inquiry to ascertain from the other members of the firm whether the loan is sought to be made with their consent and for their use. So, when a banker has the funds of a firm deposited with him for the purpose of its especial business, and when he knows that one of the firm is engaged in individual speculations, and he transfers these funds to the separate account of this member, and with a knowledge that the latter appropriates the funds to such speculations, the banker is liable to the firm for the funds thus misapplied, unless they first assure him of their consent.

The only doubt I have felt in this case arose from the absence, in the referee's findings of fact, of an express finding of knowledge on the part of the defendants of the misapplication of the funds by Carver; but, as the evidence satisfactorily shows this, and as there is enough in the whole findings to show that the funds were received from the firm for the business in which they were engaged, and that the transfer was made for the individual purposes of Carver, without the knowledge and consent of the other members of the firm, I think it is not necessary to send back the case to the referee.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clerks, Sutherland and George G. Barnard, Justices.*]

Hatch v. Brewster.

By the Court, CLERKE, P. J. The defendant, at the trial, relied on the statutes of Connecticut in relation to insolvent estates, and on the alleged fact that the pledgees to whom the Bridgeport Fire and Marine Insurance Company had transferred the note in question, as collateral security, had sold it previously to demand from the company of payment of the principal debt.

I. I can discover nothing in these statutes which makes such transfers absolutely and *per se* void. They are void only when they have been made for the purpose of enabling the debtor, in view of insolvency, to give the person receiving the same a preference over other creditors of such debtor, and with the knowledge on the part of such creditor that the transfer was so made. It was, therefore, necessary for the defendant to prove the fraudulent intent. Nothing of the kind was attempted. On the contrary, the plaintiff's counsel offered to prove that there was no such intent on the part of the insurance company, and that, at the time of the transfer, its officers did not know of its insolvency. These offers were disallowed. But, in my opinion, even if the fraudulent intent to prefer was specifically proved, the defendant could not avail himself of such a defence. The provisions to which I have referred were intended for the benefit of the creditors of the insolvent. His debtors can take no advantage of them. They are under an obligation, at all events, to pay their debts; and if the creditors choose, they can, at any time, question the right of the preferred claimant to his exclusive appropriation of them. The Connecticut statute, (*ch.* 512, § 1,) sets forth that all conveyances, &c. made by any person in failing circumstances, with a view to insolvency, shall, *as against the creditors* of the person making such conveyance, &c. be void, unless for the benefit of all the creditors equally. The defendant does not interpose a claim in the capacity of a creditor, but denies

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his liability as a debtor by virtue of these provisions to insure equality to creditors.

II. In like manner, the defendant fails in his attempt to avail himself of an alleged want of a previous demand from the company of the payment of the original debt, and want of notice of the sale. No such defense is set up in the answer or proved at the trial; and, if it was, I doubt whether the defendant could take advantage of it. The purchaser of such a security has a *prima facie* right of recovery on the production of it; and the maker cannot claim a verdict on the ground that it was not affirmatively proved that the pledgee neglected to demand payment of the pledgor, and to notify the latter of the sale; and even if this omission was proved, the debtor, as I have said, cannot take advantage of it. This was an affair between the pledgor and the pledgee, or between the pledgee and the other creditors.

III. As to the objection that there was no proof of a previous resolution of the board of directors, authorizing the company to borrow money or pledge the property. The answer to this is, that nothing appears in the case to show that the laws of Connecticut require such a resolution; and even if they do, the court would not presume that the transfer had been made in violation of the law. This is a fact, if it exists, to be shown in defense. Illegality is never presumed. On the contrary, every thing must be presumed to have been legally done, until the contrary be proved. (*See Nelson v. Eaton*, 26 N. Y. Rep. 415.) And this, by the way, applies forcibly to the other objections of the defendant.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Sutherland and Geo. G. Barnard, Justices.*]

RISLEY vs. SQUIRE and JOHNSON.

Where warehousemen refuse to deliver up property in their charge, on demand of possession and tender of all legal charges, claiming an additional sum beyond their legal charges, an action will lie, by the owner, to recover the possession.

Although the law is opposed to circuity of action, that is, opposed to any attempt to obtain indirectly, by means of a subsequent action, a result which may be reached in an action already commenced; yet where it is not known, at the time the first action is commenced, that the defendants have possession of other property of the plaintiff than that sought to be recovered in that action, a second action may be brought, for such additional property.

APPPEAL from a judgment entered upon the report of a referee.

This action was for the claim and delivery of personal property, being five bags of chiccory, valued at \$35.48, with damages for the detention thereof.

The defendants, in their answer, set up several defenses: 1st. A general denial. 2d. That they had a lien upon said goods for storage. 3d. That the plaintiff was not the real party in interest. 4th. A former action pending for the same cause of action. The action was referred and tried before a referee. Upon the trial it appeared that on February 28, 1863, A. Blume & Co. stored with the defendants 635 bags of chiccory, for which the defendants gave the following receipt:

“New York, February 28, 1863.

Received in U. S. bonded warehouse, Nos. 6, 8 and 10
Bridge street. Messrs. Blume & Co. (caravan trans.)

This receipt not negotiable. Marks and numbers:

No marks. Six hundred and thirty-five bags chiccory.
Stamp, 25.

Storage, 3.

Labor, 3.

(Signed)

SQUIRE & JOHNSON.”

That on that day A. Blume & Co. sold said goods to John Tappan, Cyrus Scofield and John Fox, copartners

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under name of John Tappan, and delivered above receipt to said John Tappan, with the following indorsement:

“Please transfer within-mentioned goods to Mr. John Tappan and others. Feb. 28, 1863.

A. BLUME & Co.”

That on July 6, 1864, said John Tappan sold said chicory, as 640 bags, to Leander S. Risley and Christopher Risley, partners under name of C. Risley. Tappan applied to the defendants for their bill of charges upon said goods, which they furnished, amounting to \$371.72. Tappan admitted the bill to be correct, except that it was \$38.10 too much, by reason of an increase of rates from three to four cents per bag per month after January 12, 1864, which he refused to pay, claiming that the defendants were limited by the price named in the receipt to A. Blume & Co. The defendants afterwards bestowed labor upon said goods amounting to \$25.40, not mentioned in the bill. Tappan offered to pay, and tendered to the defendants the amount of said bill, less \$38.10, and demanded the goods, with which demand the defendants refused to comply, but nothing was said or done about the \$25.40. The plaintiff thereafter, on July 19, 1864, commenced an action for the recovery of 635 of the 640 bags, which were taken by the sheriff and delivered to the plaintiff. The defendants offered to the sheriff, and requested him to take the whole 640 bags under the plaintiff's requisition in that action, which he refused to do. The defendants then offered to the plaintiff to deliver to him the 640 bags, and to pay all costs and disbursements of said action, which the plaintiff refused to receive, unless the defendants would also pay, in addition to the taxable costs and disbursements of said action, \$25 counsel fee of the plaintiff's counsel in said action. Thereafter, and on August 11, 1864, the plaintiff commenced a second action in the Supreme Court, against the defendants, for the recovery of the five bags. Both

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actions are still pending and undetermined. The value of the five bags was \$35.48. The plaintiff paid to the sheriff upon his demand \$26.10 for services and expenses connected with the keeping and delivery of the possession of said five bags, but there was no evidence of the character or nature of the services of said sheriff for which such payment was made to him by the plaintiff. The plaintiff sustained no other damage by reason of the detention of said five bags, except the sum so paid to the sheriff. There was never tendered to the defendants any other or greater sum than \$333.62.

When the plaintiff rested, the defendant moved to dismiss the complaint upon the following grounds. 1st. That the defendants had a lien for storage on the goods at the time of the commencement of the action, for which no tender had been made. 2d. That the goods had been transferred to Christopher Risley, and not to the plaintiff, and the plaintiff had no title to the goods. 3d. There was a defect of parties plaintiff, in that said Risley was not a party plaintiff. 4th. That Blume & Co. had never transferred any contract to store the goods, but only sold the goods. 5th. That it appears that another action for the same cause of action, to wit, the first action, was pending between the same parties. The referee denied the motion and the defendants excepted.

When the case was closed, the defendant renewed the motion upon the following grounds: 1st. That at the commencement of the action the defendants had a lien for storage and labor, for which no tender had been made. That the only pretense of a tender was for the \$333.62, and none had been shown or claimed as to the \$25.40, labor not included in the bill. 2d. That the goods had been transferred to Christopher Risley, and not to the plaintiff, and the plaintiff had shown no title to the goods. 3d. That there was a defect of parties plaintiff, in that said Christopher Risley was not a party plaintiff. 4th. That

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it being admitted that the defendants' charges were reasonable and proper on a *quantum meruit*, the defendants still had a lien; for the contract with A. Blume & Co. even if it was transferrable to John Tappan, or to the plaintiff, had never in fact been transferred, and that the contract, having been put an end to, did not prevent the defendants charging, or relieve said Tappan from paying a reasonable and proper charge for storing the goods for him. That A. Blume & Co. having parted with their interest in the goods, had no interest in the contract, and not having transferred the contract, Tappan could not claim under it any rights against the defendants that they should store the goods at an unreasonable rate. 5th. That it appears that another action, for the same cause of action, to wit, the first action, has been commenced, and is now pending between the said parties. The referee denied the said motion, and the defendants excepted. The case was then submitted to the referee, who found the foregoing facts, and found as conclusions of law: That by the contract with A. Blume & Co. contained in the receipt, the defendants were limited to the charge of three cents per bag for storage, and could not increase the same as against said John Tappan or the plaintiff. That the pendency of the action for the 635 bags was no defense to the action for the remaining bags; and the latter was a different cause of action from the former. That the plaintiff was entitled to recover as damages the \$26.10, for money paid to the sheriff. That the defendants having presented their bill containing an illegal charge to the amount of \$38.10, and refusing to deliver the goods till that charge was paid, could not, after tender of the correct amount due on that bill, justify their retention of the property by setting up a correct lien for other charges founded on no specific agreement, but on a *quantum meruit* to which they then made no claim. That the plaintiff was

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entitled to recover the possession of the property and \$26.10 damages. The defendants excepted.

Judgment having been entered accordingly, the defendants appealed.

S. B. Brownell, for the appellants.

John Fitch, for the respondent.

By the Court, CLERKE, P. J. The findings of fact cannot be disturbed by us. There is not only some evidence tending to support them, but the referee would have clearly erred, if he had come to any other conclusion. He finds that the plaintiff was the owner of the five bags of chiccory; that possession was demanded from the defendants and all legal charges were tendered; that they refused to surrender these bags, and that they had no right to charge four cents, and were only entitled to three cents per month. The only question in the case, in which there was room for any reasonable doubt, is that arising from the pendency of another action. Certainly, the law is opposed to circuity of action; that is, opposed to any attempt to obtain indirectly by means of a subsequent action, a result which may be reached in an action already pending. But, when the first action, the pendency of which the defendants set up, was commenced, it was not known to any of the parties that the defendants had custody of the five bags, for which this action was brought. The plaintiff's right to 640 bags was not disclosed; evidently, therefore, the second action was not commenced for the purpose of obtaining, indirectly, by means of it, a result which might have been reached in an action already pending.

I think, therefore, that the findings of fact and law on the issues are correct. But the sum paid to the sheriff for services and expenses, cannot be allowed to the plaintiff

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as damages. If they are chargeable at all, they should be charged as costs or disbursements, and taxed by the clerk on due proof of their nature and character.

I advise that the judgment should be affirmed, without costs, provided the plaintiff shall consent to deduct those damages from the judgment, reserving to him the right, if he should do so, to have his costs retaxed. If he refuse to deduct those damages the judgment should be reversed, with costs. The same disposition should be made of case No. 1, between the same parties. The same error was committed by the referee in allowing the plaintiff, as damages, the sum of \$103, paid to the sheriff.

NEW YORK GENERAL TERM, JANUARY, 4, 1869. *Clerks, Sutherland and Geo G. Barnard, Justices.*

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ELLIOTT vs. WOOD and others.

Wherever a conveyance transferring an estate is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appears from the same instrument or any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations contained in it.

A mortgagee of property, authorized by the mortgage to sell the property, at public auction, and to become a purchaser of it at the sale, is not in that peculiar confidential relation to the mortgagor which the law regards as a fiduciary relation, such as that of guardian and ward, attorney and client, or trustee and *cestui que trust*.

Although in all cases of purchases and bargains respecting property, made between principals and agents, the utmost good faith is required, yet a sale of his principal's property at which the same is purchased by an agent, is not necessarily void. The transaction should, undoubtedly, be scrutinized closely; but it is only voidable where there has been undue influence and advantage, or where there has been imposition. *Per CLERKE, P. J.*

It is different where the strict relation of trustee and *cestui que trust* exists. In such a case the principle applies where a purchase has been made by a trustee, of the property of his *cestui que trust*; although it was sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether made *bona fide* or not. *Per CLERKE, P. J.*

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The owners of a certain guano island entered into an agreement with W. and G. to convey to the latter one half of said island, for \$30,000; the grantees, in addition to paying that consideration, binding themselves to furnish a working capital of \$20,000; and it was stipulated that W. and G. should have the sole control and management of the property for the mutual benefit of all the owners. A deed was executed, in pursuance of this agreement. The plaintiff, being the owner of one fourth of the property, mortgaged his interest to V. to secure \$8075, and he subsequently executed another mortgage, on his interest, to the defendants, to secure the payment of their claims against him. By a power contained in such mortgage, the mortgagees were authorized, in case of default of payment, upon a specified notice, to sell the mortgaged property at public auction, with the privilege of themselves becoming the purchasers. In pursuance of the power contained in their mortgage, the defendants, after demand of payment and on notice of sale, sold the plaintiff's interest in the property, and purchased it themselves, for \$25; and subsequently, V. under the power in his mortgage, sold the plaintiff's interest for \$1200, the defendants being also the purchasers.

Held that the relation between the parties was not that of trustee and *cestui que trust*, but at most it was only one of principal and agent; and that in the absence of any proof of undue influence or advantage or imposition, the sales were valid, unless other principles of law rendered them void.

Under the statute authorizing a sale of mortgaged premises by advertisement, in all cases where the mortgage contains a power of sale, on complying with the requirements of the statute, as to the manner of advertising and conducting the sale, and declaring that every sale made pursuant to such a power shall be equivalent to a foreclosure and sale under the decree of a court of equity, it is only necessary, in a case where the mortgage provides that the notice of sale shall be for a shorter time, and in a different manner from that specified in the statute, that the sale should be public and not private, and that there should be notice.

By this, the rights of mortgagors are sufficiently protected; and if they have themselves provided expressly for a time and manner different from that prescribed by the statute, and if the sale is in conformity with the provisions of the mortgage, it will be upheld, particularly when it is manifest that the method contained in such provisions is more likely to secure notice to the mortgagor than the method prescribed by the statute. *Per CLERKE, P. J.*

As the 7th section of the statute expressly declares that the mortgagee, his assigns, &c. may fairly and in good faith purchase the mortgaged premises at the sale, and as the section makes no exception, this can be done, even when the mortgage contains no provision to that effect.

As usurious contracts are not absolutely void, but are capable of being treated as valid, by the borrower, if the mortgagor allows the property to be sold under a foreclosure, without taking the necessary means to avoid the mortgage, an innocent purchaser cannot be affected by any usury in the loan.

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THIS is a motion by the defendants, Woods, for a new trial, under section 268, subdivision 1 of the Code, upon a case and exceptions to review a decision at special term, directing an account.

On the 6th of June, 1857, John E. Gowan, Franklin Copeland, George R. Field and the plaintiff, Andrew C. Elliott, then owners of the guano island of Sombrero, in the Carribbean Sea, made a written agreement with the defendant, Ross W. Wood, and one Alexander H. Grant, partners as Wood & Grant, to convey to the last named parties one half of said island for the consideration of \$30,000; said Wood & Grant, in addition to the consideration aforesaid, binding themselves to furnish a working capital of \$20,000, to be employed, as far as necessary, in the collection and shipment of guano from the island, the residue to be divided proportionately among the parties in interest. It was also stipulated that Wood & Grant should "have the whole and sole control of the working and management of the whole for the mutual benefit of themselves and the parties hereinbefore mentioned * * * the right to sell, convert into a joint stock company, or work for mutual benefit, to be vested solely in Wood & Grant." By deed, dated August 5, 1857, referring to and making said agreement part thereof, Gowan, Copeland, Elliott and Field, conveyed an undivided half of the island to the said Ross W. Wood and Alexander H. Grant; On the 11th of October, 1858, the plaintiff, then owning one fourth of the island, mortgaged his interest to the defendant Van Veehten, to secure an indebtedness of \$8075, at the same time executing his note to the mortgagee for usurious interest, (as claimed by the plaintiff,) on the amount so secured. On the 23d of November, 1860, the plaintiff executed another mortgage on his interest to the defendants, Ross W. and Richard D. Wood, partners as Ross W. Wood & Son, (the firm of Wood & Grant having been previously dissolved by the withdrawal of Grant and the substitution

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of Richard D. Wood,) to secure payment, on demand, of all claims of Ross W. Wood & Son, against the plaintiff for moneys advanced. By the terms of a power contained in the mortgage the mortgagees were authorized, on default of payment, and on giving a prescribed notice, publicly to sell the mortgaged property, with the privilege of themselves becoming purchasers. On the 16th of August, 1861, Ross W. Wood & Son, having demanded payment and given the stipulated notice, sold the plaintiff's interest in the island and the enterprise, *and purchased it themselves*, for \$25. On the 9th of October, 1861, Van Vechten, whose claim against the plaintiff was then represented by four renewed notes for the aggregate amount of \$9080.93, pursuant to a power embodied in his mortgage, publicly sold the plaintiff's interest in the island and every thing connected therewith, for \$1200, Ross W. Wood, (on account of Ross W. Wood & Son,) being the purchaser. The firm of Wood & Grant, and their successors, Ross W. Wood & Son, assumed and exercised the entire control and management of the island and the enterprise, under the agreement of June 6, 1857, from its date till some time in the month of February, 1861, since which time Wood & Son (as claimed by the plaintiff) have assumed to be the exclusive owners; have refused to recognize the plaintiff's title; have kept exclusive and forcible possession of the island and property thereon; have received and appropriated the proceeds thereof, and have refused to account to the plaintiff. To compel an accounting, and to effect the plaintiff's restoration to the enjoyment of his interest, this action is prosecuted. The defenses set up are, substantially, the mortgage sales before referred to, a decree of the Circuit Court of the United States, dismissing, for want of prosecution, a bill in equity filed by the plaintiff against the defendants, embracing the same subject matters involved in the present suit, and a counter-claim founded on the

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Van Vechten notes, assigned, as is alleged, to Ross W. Wood & Son before the commencement of the action.

The plaintiff replied to the counter-claim the usurious character of the notes.

The case was tried at special term in the city of New York, in December, 1866, before Hon. Justice Mason, who decided the mortgage sales ineffectual to bar the plaintiff's right to the relief demanded; held the Van Vechten notes and mortgage void for usury; and appointed a referee to state and report an account between the parties from the beginning of the enterprise to the date of the report. To review this decision was the object of the present motion.

James Clark, for the plaintiff. I. The defendants cannot call in question the plaintiff's original title, his and theirs being derived from the same source. (*Jackson v. Hinman*, 10 John. 292. *Fitch v. Baldwin*, 17 id. 161. *Douglass v. Scott*, 5 Ohio R. Ham. 194. *Bloom v. Burdick*, 1 Hill, 130. 1 *Greenl. on Ev.* § 23.)

II. The plaintiff's title was not divested by the sale under the mortgage of November 23, 1860, to the defendants, Ross W. and Richard D. Wood. 1. By the agreement of June 6, 1857, Wood & Grant, and their successors, Ross W. Wood & Son, were made trustees and agents of the plaintiff, and could not, therefore, become purchasers of the trust property for their own use. (*Willard's Eq. Jur.* 186, 190. 1 *Story's Eq. Jur.* §§ 322, 323. 2 *Sugden on Vend. and Pur.* London ed. 1824, 190. *White's Leading Eq. cases*, 72, and notes. *Davoue v. Fanning*, 2 John. Ch. 252. *Michoud v. Girod*, 4 How. U. S. 554. *Holt v. Holt*, 1 Chan. Cas. 190. *Whelpdale v. Cookson*, 1 Vesey, 9. *Fox v. Mackreth*, 2 Bro. 400. *Ex parte Reynolds*, 5 Vesey, 707. *Ex parte Bennett*, 10 id. 385. *Coles v. Trecothick*, 9 id. 246. *Stuart v. Kissam*, 2 Barb. 493. *Quackenbush v. Leonard*, 9 Paige, 334.

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Slade v. Van Vechten, 11 *id.* 21. *Mills v. Goodsel*, 5 *Conn. R.* 475. *Cumb. Coal and Iron Co. v. Sherman*, 30 *Barb.* 553. *Robinson v. Smith*, 3 *Paige*, 222. *Butts v. Woods*, *Court of Appeals, N. Y. Trans. Aug. 3, 1868.*) 2. *Ross W. Wood & Son* sold the property under a power conferred upon them by the mortgage. Under such circumstances, in the absence of statutory authority, they could not become purchasers at their own sale. (1 *Washburn on Real Prop.* 528, 529. *Jenison v. Hapgood*, 7 *Pick.* 1. *Downes v. Grazebrook*, 3 *Meriv.* 200. *Benham v. Rowe*, 2 *Cal. R.* 387. *Hyndman v. Hyndman*, 19 *Ver. R.* 9. *Waters v. Groom*, 11 *Clark & F.* 684. 1 *Lead. Cas. in Eq.* 211, note. *Hoyt v. Martense*, 2 *Smith*, 231. *Slee v. Manhattan Co.* 1 *Paige*, 48. *Dobson v. Racey*, 4 *Selden*, 216. *Bergen v. Bennett*, 1 *Caines' Cases in Error*, 1.) The proposition that in the absence of statute authority, a mortgagee cannot purchase at a sale made by himself, under a power, is especially sustained by the case of *Dobson v. Racey*, above cited. The New York statute authorizes such purchase only when the power is contained in the mortgage; and in the case referred to, it is held that at a sale under a power subsequently conferred, the mortgagee cannot purchase, the statute conferring no such privilege. This is a direct recognition of the doctrine that but for the statute the mortgagee could, in no case, purchase at his own sale under a power. The statute of New York, (2 *R. S. Edm. ed.* 566,) authorizing the mortgagee to purchase at his own sale under a power contained in the mortgage, having no extra territorial force, is inapplicable to the present case. Even if the statute were applicable, the sale in question was not conducted in accordance with its provisions. (2 *R. S. Edm. ed.* 565.) 3. The stipulation that the mortgagees may not only sell but purchase, does not affect the question. Every mortgage is subject to the mortgagor's equity of redemption; a right which can be barred in one or more of the following modes only. (1.) By a decree of foreclosure or sale.

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(2.) By a sale under a power, which, in the absence of statutory authority, cannot be made to the party vested with the power. (3.) By the mortgagor's release subsequent to the mortgage. (4.) By lapse of time, (twenty years.) The parties to a mortgage cannot, even by an express agreement embodied in it, deprive the mortgagor of his right to redeem. (2 *Story's Eq. Jur.* § 1019. *Crabb's Law of Real Prop.* § 2262. 4 *Kent's Com.* 158. *Coote on Mortgages*, 11. *Henry v. Davis*, 7 *John. Ch.* 40.) It is a necessary inference, from the last proposition, that a stipulation in a mortgage providing for the extinguishment of the equity of redemption in a manner legally unauthorized, is void. (*Lawrence v. Farmers' Loan and Trust Co.*, 3 *Kern.* 200.) A purchase by the mortgagee, at a sale made by himself under a power, is not, as already stated, in the absence of statutory permission, an authorized mode of barring the equity of redemption. Consequently, a stipulation in a mortgage, that the right to redeem may be cut off by such purchase and sale, is an agreement impairing the equity of redemption, by providing for its extinguishment in a manner legally unauthorized. In *Lawrence v. The Farmers' Loan and Trust Co.*, (3 *Kern.* 200,) in which the Court of Appeals held a private sale by the mortgagee under a power expressly authorizing him to sell the premises "either by public auction or at private sale," inoperative, because it was an unauthorized mode of barring the equity of redemption, it was conceded by the distinguished counsel who argued in favor of the validity of the sale, while contending that a power authorizing a mortgagee "to sell for the satisfaction of his demand, * * * was at all times valid by the English common law," that nevertheless, under such a power, "the mortgagee could not, at common law, have obtained a strict foreclosure; for a sale to himself, directly or indirectly, would have been voidable in equity." "The foreclosure of a mortgage cannot be caused, by the admission of the parties, in a manner not author-

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ized by law." (*Pease v. Benson*, 28 *Maine R.* 336.) Whatever might have been the effect of the power conferred upon Wood & Son to both sell and purchase, in the absence of the trust created by the agreement of June 6, 1857, the fiduciary relationship created by that agreement, rendered the mortgagees incompetent to become purchasers of the trust property on their own account. (*See authorities before cited.*) Equity regards with jealousy all dealings between trustees and *cestuis que trust*, interfering on the slightest appearance of hardship or advantage, and going so far, even, as to deem such transactions void *prima facie*, and to require their fairness to be affirmatively shown. (*Cumb. Coal Co. v. Sherman*, 30 *Barb.* 573. 65 *Law Library*, 146.) The power in the mortgage to Wood & Son, not only authorized the mortgagees to purchase at their own sale, but required no public notice of such sale to be given.

III. The plaintiff's title was not divested by the sale to Ross W. Wood, under the mortgage to Van Vechten. 1. At the date of the sale, the purchaser sustained a fiduciary relationship to the plaintiff in respect to the mortgaged property, and could not, therefore, purchase it for his own advantage. (*Davoue v. Fanning*, 2 *John. Ch.* 252, and other authorities before cited.) The pretense of Wood & Son, that they were obliged to purchase for their own protection, is without foundation; for, by the terms of Van Vechten's mortgage, it is made subject to the plaintiff's indebtedness to Wood & Son. Had it been otherwise, and had the defendants bid in the property to protect their own interest, they would, by reason of their fiduciary character, still hold the title in trust, subject to a claim upon it for the amount paid to purchase it in. (*Willard's Eq. Jur.* 188. *Quackenbush v. Leonard*, 9 *Paige*, 334. *Slade v. Van Vechten*, 11 *Paige*, 21.) "A trustee who buys in an outstanding incumbrance against the trust estate, is only entitled to hold such incumbrance as a security for the amount actually paid by him therefor, with interest."

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(*Willard's Eq. Jur.* 188.) "If a trustee has a personal interest in the sale, which may be sacrificed if he is not permitted to bid, the court will appoint a master, or another trustee in his place, to make the sale. But even in these cases, the court must be satisfied that the interest of the *cestuis que trust* will not suffer in consequence of such permission. If the trustee, in virtue of his trust, possess superior advantages of information as to the situation and value of the property, so that he will not come to the sale on terms of equality with other bidders, the court will not put him in a situation, which may make it for his interest to keep that information to himself." (*Willard's Eq. Jur.* 178, 188. *De Caters v. Le Ray Chaumont*, 3 *Paige*, 178.)

2. The claim of Van Vechten and the mortgage given to secure it, are void for usury. The court has found, and the evidence shows, that coterminously with the execution of the mortgage to Van Vechten, and as part of the same transaction, a note was given by the mortgagor to the mortgagee for usurious interest on the debt intended to be secured. This annulled the entire transaction. (*Merrills v. Law*, 9 *Cowen*, 65.) Even *negotiable securities* are void in the hands of *innocent holders*, if tainted with usury. (*Lowe v. Waller*, *Doug.* 736. *Bowyer v. Baampton*, 2 *Strange*, 1155. *Kent v. Walton*, 7 *Wend.* 256. *Bebee v. Bank of N. Y.* 1 *John.* 534, *note.* *Thompson v. Berry*, 3 *John. Ch.* 395.) The decision in *Jackson v. Henry*, (10 *John.* 185,) that an innocent purchaser under a statute foreclosure, is not affected by the usurious character of the mortgage, proceeds expressly on the ground that the statute, (2 *R. S. Edm. ed.* 566, § 8,) in terms, gives to such sale, as to a *bona fide* purchaser, the effect of a *decree of foreclosure*; and it is too late to plead usury after a judgment or decree. But the statute declaring the effect of a foreclosure by advertisement and sale, has no application to the case at bar, the mortgaged property being situated out of the state. In *Hyland v. Stafford*, (10 *Barb.* 558,) it

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was held that the statute giving the effect of a decree of foreclosure to a sale made pursuant to its provisions, does not apply where the vendee has notice of the usurious character of the mortgage, *and that a subsequent innocent purchaser from such vendee, takes no title.* It is a necessary inference, that but for the protection afforded by the statute, (inapplicable to this case,) declaring the effect of foreclosure by advertisement and sale, even a *bona fide* purchaser at such sale would be liable to have his title defeated by showing usury in the mortgage debt; for, apart from the statute, an innocent purchaser from a vendee having notice of usury, stands in as favorable a light as an innocent purchaser under a mortgage tainted with usury. It is not necessary, in order to entitle a party to relief against a usurious mortgage, that a tender should be made of the principal of the mortgage debt. (1 *R. S. Edm. ed.* 276, § 8. *Cole v. Savage*, 10 *Paige*, 583. *Manice v. N. Y. Dry Dock Co.*, 3 *Edw.* 143. *Folsom v. Blake*, *Id.* 442.) The principle that a mortgagee or purchaser of an equity of redemption, cannot attack, on the ground of usury, a mortgage subject to which he has taken his conveyance, is inapplicable to the question in hand. *Ross W. Wood & Son*, it may be admitted, could not call in question the validity of *Van Vechten's* mortgage, their own having been taken subject to it; but that is far from saying they can acquire a good title *under it.* (*Ord on Usury*, 131. *Blydenburgh on Usury*, 106. *Post v. Dart*, 8 *Paige*, 639. *Shufelt v. Shufelt*, 9 *id.* 137. *Dix v. Van Wyck*, 2 *Hill*, 522. *Morris v. Floyd*, 5 *Barb.* 130. *Berdan v. Sedgwick*, 40 *id.* 359.)

The clause in the mortgage to *Ross W. Wood & Son*, making it subject "to all the rights of the said *John Van Vechten* under the said indenture of October 11, 1858," &c. does not estop the plaintiff from alleging the usurious character of the latter's claim. Its office is simply to *limit or qualify the estate granted.* It was never intended or un-

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derstood as a representation designed to induce the mortgagees to become purchasers *of or under* the Van Vechten mortgage. It is not an *estoppel* by deed, for *that* only operates in favor or support of the estate or right granted. It is not an *estoppel in pais*, to create which there must be an admission by the party "intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. *This I understand to be the very definition of an estoppel in pais.*" (Cowen, J. in *Dezell v. Odell*, 3 Hill, 225.) An admission made in *one* transaction, without any intention of influencing a party's conduct in reference to *another*, cannot operate as an estoppel with respect to the latter. (*Reynolds v. Lounsbury*, 6 Hill, 534. *Lawrence v. Brown*, 5 N. Y. Rep. 394. *Ferguson v. Hamilton*, 35 Barb. 427. *Chautauque Co. Bank v. White*, 6 N. Y. Rep. 236. *Pickard v. Sears*, 6 A. & E. 469.)

IV. The plaintiff's interest in the island in question, is an interest in *real estate*, and not as claimed by the defendants, a mere chattel interest. 1. It is so treated by all the conveyances and mortgages. The original deed to Wood & Grant recites that the grantors, of whom the plaintiff was one, are "*the owners of the said island*;" and it purports to convey to the grantees, "their heirs and assigns, all and singular the *one equal undivided half part of the said island* : * * * to have and to hold the same to the said parties of the second part, their heirs and assigns forever," covenanting that the grantors have good right to convey "*the said premises.*" The mortgage to Van Vechten recites that John E. Gowan and Franklin Cope-land had "sold and conveyed to one George R. Field, one equal undivided eighth part of *said island*, and to the said Andrew C. Elliot, *two equal undivided eighth parts thereof*," and purports to convey to the mortgagee, "his heirs and assigns forever, all the right, title, and interest of the said

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party of the first part (plaintiff) of, in and to the said island of Sombbrero: * * * * to have and to hold the same unto the said party of the second part, his heirs and assigns forever," concluding with a covenant against the grantor's acts. The mortgage to Ross W. and Richard D. Wood recites that "*the said island and the enterprise connected therewith, now belong to the said Andrew C. Elliott, Ross W. Wood and J. A. Warner*, in the following proportions, to wit, the said Elliott and said Warner each having an equal one undivided fourth part thereof, and the said Ross W. Wood an undivided half part thereof," and further recites that said Elliott "*is now the owner of the said undivided fourth part of said island and of the enterprise connected therewith*," conveying and covenanting substantially as the mortgage to Van Vechten. It is submitted that the defendants, Ross W. Wood & Son, are concluded by the foregoing recitals and covenants, and that, whatever may have been the character of the plaintiff's original title, the defendants are estopped from denying that at the date of the last mentioned mortgage, "*the island*" and the enterprise connected therewith, "*belonged*" to him and his associates, he being the "*owner*" of an "undivided fourth part" thereof. 2. The exclusive right of occupancy, for the purpose of obtaining and selling guano, secured, under certain conditions, by the act of congress of August 18, 1856, to the discoverers of islands, rocks, and keys containing such deposits, is a title to real estate. (*Brightly's Digest*, 301.) It is an interest in land, unlimited in duration; and the term "real estate, includes every possible interest in lands, except a mere chattel interest," or term for years. (*Jackson v. Parker*, 9 Cowen, 81. *Kent's Com.* 401. *First Bap. Church v. Bigelow*, 16 Wend. 28.)

V. If it be conceded, as claimed, that the plaintiff held a mere chattel interest, it does not vary the rights of the parties. 1. Mortgages of chattels real possess the incidents of mortgages of realty, and not of mortgages of per-

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sonalty. (*Breese v. Bange*, 2 *E. D. Smith*, 474.) 2. The principle that a trustee cannot purchase the trust property on his own account, applies as well to chattels as to realty. (*See authorities before cited.*)

VI. The decree of the Circuit Court of the United States, dismissing the plaintiff's bill in equity, is no bar to the present action. The bill was not dismissed after a hearing on the merits, but "for want of prosecution." "An order of admission is no bar, unless it determines that the plaintiff is not entitled to the relief sought; therefore, *an order dismissing a bill for want of prosecution is no bar.* (6 *Library of Law and Eq.* 191. *Welford's Eq. Pl.* 357. *Brandlyn v. Ord*, 1 *Atk.* 571. *Mitf. by Jeremy*, 238. 14 *Vesey*, 232.)

S. P. Nash, for the defendants. I. The plaintiff having mortgaged his entire interest in the island, enterprise and proceeds, to John Van Vechten, with power of sale by way of foreclosure, the sale by said Van Vechten under the said mortgage, to the Woods, as the highest bidder, was equivalent to a sale by Elliott himself, and estopped him from claiming as against the Woods any rights in derogation of such sale. (1.) The court, at special term, held that the interests of Elliott and of the other parties in the said island and enterprise having been conveyed and described as real estate, must be so regarded. This was error, and influenced the court in its other findings. None of the parties had any claim to have been discoverer of the island. Those first connected with it, Field and Gowen & Co. only claimed to have taken possession of it as an uninhabited island. The proceedings under the guano act never came to any thing. The interests of the parties were, therefore, interests in machinery and tools for mining guano, the product itself, and the moneys received, all personal property. (*The Am. Guano Co. v. The U. S. Guano Co.* 44 *Barb.* 23.) Parties, by the

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language used in their transfers, do not make personal property real estate, and besides, in all the transfers the nature of the interest as a simple possessory one was stated. There is nothing, then, in the idea of the property being real estate, which rendered the sale under the Van Vechten mortgage ineffectual. (2.) Assuming that as between the plaintiff and Van Vechten, the Van Vechten mortgage was void for usury, the plaintiff is estopped from setting up such usury against Wood & Son, who were purchasers in good faith without notice. There is nothing to show that the Woods knew any thing of the usury. The proceeding by Van Vechten was in hostility to their interests, and they were obliged to buy for self protection. Elliott conveyed by mortgage to Wood & Son subject to the mortgage he had made to Van Vechten, subject to Van Vechten's demand as a valid indebtedness. By so conveying he waived the usury and put it out of their power to contest the mortgage, and made it as to them a valid security. (*Sands v. Church*, 2 *Seld.* 347, and other cases cited and approved in *Williams v. Tilt*, 36 *N. Y. Rep.* 319, 325, 326. *Murray v. Barney*, 34 *Barb.* 336. *Berdan v. Sedgwick*, 40 *id.* 359. *Hardin v. Hyde*, *Id.* 435. *Hartley v. Harrison*, 24 *N. Y. Rep.* 170. *Chamberlain v. Dempsey*, 36 *id.* 144, 148, 149.) (3.) In *Jackson v. Henry*, (10 *John.* 195,) a title acquired by a *bona fide* purchaser at a statute foreclosure was sustained against an attempt to defeat it on the ground of usury in the mortgage under which the sale was made. The judge, at special term, thought this case could only be sustained under the statute making such a sale equivalent to a foreclosure and sale under decree. But the decision was placed by the court clearly on the ground that the mortgagor, by allowing the sale to go on, was estopped to deny its validity as against a *bona fide* purchaser; and as authority for this rule the case is still approved. (*Williams v. Tilt*, 36 *N. Y. Rep.* 319, 325, 326. *Dix v. Van Wyck*, 2 *Hill*, 522.) (4.) It is true that in

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Cameron v. Irwin, (5 *Hill*, 272,) and *Hyland v. Stafford*, (10 *Barb.* 558,) the judges were troubled to see how a purchaser under a void power could get a good title. But it is now settled that usurious contracts are voidable, not void, and a power to sell in a usurious mortgage may become good, if the mortgagor fails to assert its validity in time. (5.) The power of sale was executed in accordance with authority given in the mortgage, and there is no equity in permitting the plaintiff to repudiate it.

II. The purchase by Wood & Son, at the sale under their own mortgage, was a bar to all right of equitable relief. (1.) This mortgage recited an indebtedness in November, 1860, of "about twenty thousand dollars," and authorized Wood & Son, in case of non-payment on demand of any sums then due or to become due, to sell at public auction on notice to be given, as specially provided, all the interests mortgaged, and to become the purchasers at any such sale, which should be "a perpetual bar both in law and in equity, against the said Elliott." On the first of May, 1861, Wood & Son rendered a full account against Elliott; made demand for payment; served the ninety-day notice of sale as required; and on the 16th of August, 1861, put up for sale by a licensed auctioneer, and being the highest bidders themselves, bought the property. This sale was an extinguishment of the plaintiff's rights. (*Olcott v. The Tioga R. R. Co.* 40 *Barb.* 179; *affirmed* 27 *N. Y. Rep.* 546.) (2.) There was no fiduciary relation between Wood & Son and Elliott to preclude their purchasing Elliott's interest. They were not by the original agreement, made in any way trustees, any further than like partners, to manage the business honestly. Wood & Son would have had no right to buy the products of the island of themselves, or in the matter of sales or purchases to act in the double character of an individual firm, and associates in a joint enterprise. But they were not trustees of the individual interests of the other asso-

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ciates. They were free to buy out the share of either at an agreed price, or to lend money on such share. (3.) There was no obligation imposed by the agreement to continue the joint interest indefinitely. If there had been, it was terminated by the contract of January 13, 1860, itself terminated shortly afterwards. (*See Wood v. Warner*, 15 *New J. Ch.* 81.) (4.) All actual confidence had ceased between the parties before the proceedings of Wood & Son, under their mortgage. The letters of April and May, 1861, show they had broken with each other. Elliott was insolvent in 1860, and attempting to dispossess Wood & Son of the island. The accounts were served on him in April and May, and the sale took place on the 16th August, 1861. On the 15th, he filed a bill for an accounting and to restrain the sale. It cannot be claimed that at this period Elliott was reposing any trust or confidence in Wood & Son, which debarred them from enforcing their remedies against him. (5.) There is no allegation of surprise about the sale. Elliott had received the accounts; knew he owed a large sum of money, and knew the situation of things on the island, where he had himself been. He had ninety days to induce any one to take his position in the business, but he knew its affairs were desperate, and but for Mr. Wood's "selling every thing he had to obtain money," it would have gone to ruin. (6.) If Wood & Son had sought relief from the court, either a sale would have been ordered, at which they would have been allowed to buy, or Elliott would have been foreclosed after a fixed period for redemption. The full and express power given in the mortgage to save the delay and expense of a suit should be carried out according to its spirit and intent.

III. But if the sale did not foreclose all equity of redemption, it was an effectual termination of the enterprise as one still proceeding on joint account. The plaintiff's right, if any, was only to have the property sold revalued and Wood & son charged with the value. The

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property became the absolute property of Wood & Son, subject only to this re-adjustment, and they had a right to deal with it as their own, without being liable for any profits made out of its subsequent employment. (*Olcott v. Tioga R. R. Co. ubi supra.*) But the decision at special term, holds the sale entirely inoperative and void, and directs an account to be taken down to the time of the referee's report as of a continuing partnership.

IV. The equitable claim above stated, to have the property re-valued, is one addressed to the favor of the court, and not to be allowed against equity. In all such cases, laches, or the lying by of a party when he ought to act peremptorily, is good ground for denying relief. This is especially so in matters of commercial, mining or other similar enterprises. (*Lindl. on Part.* 761, 762. 87 *Law Lib.* *Frost v. Koon*, 30 *N. Y. Rep.* 428.) It was in the spring of 1861, when, owing to the war, all commercial enterprise was uncertain, that Wood & Son had to decide what to do with the adventure they had undertaken. It was over \$50,000 in debt to them; their associates were insolvent; their own means exhausted. They were entitled, if they struggled to keep it alive, to do so on their own account. Elliott had done nothing to prevent the sale they had advertised, nor Van Vechten; he brought a suit for an account, but did not prosecute it, and it was dismissed for want of prosecution, and not till three years afterwards (1864) did he commence these proceedings.

VI. If the case is considered as turning on the fact of usury, there was no usury in the original deed to Van Vechten, nor in the moneys thereby secured. The subsequent agreement, by which the deed was made to stand for a still further loan, in which there was usury, could not invalidate the original security.

VII. The decision of the special term should be reversed, and judgment ordered for the defendants Wood & Son.

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By the Court, CLERKE, J. As to what constitutes a mortgage, courts of equity hold that the particular form or words of the conveyance are unimportant; and it is laid down, as a general rule, that wherever a conveyance transferring an estate is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appears from the same instrument or any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations contained in it. In the present case an absolute conveyance, on its face, in the two instances was given; one to Van Vechten, the other to Ross W. Wood and Richard D. Wood; but by a defeasance in each case, the transaction became a mortgage, and the mortgagor is entitled to all the rights of the owner of the equity of redemption.

In determining the nature of the property mortgaged, the proper and legal mode of foreclosing the equity of redemption, and the rights of the parties, we must be governed entirely by the language employed by them in the instruments which they adopted as the evidence of their agreements. By these agreements, it is evident that they considered the mortgaged property as real estate, to be treated and dealt with precisely as if it was situated within the territorial jurisdiction of the state of New York, subject to the provisions prescribed by its laws relating to the foreclosure of the equity of redemption, and to any rights pertaining to any of the parties. To the mortgagees in both instruments, the plaintiff conveys all his right, title and interest of, in and to the island of Sombbrero, situated in the West Indies, and in and to all deposits, minerals, earths, fossils, and property of every nature and description on the said island; and, in both defeasances, it is expressly provided that the respective mortgagees, or their legal representatives or assignees, may become the purchasers at the foreclosure sale; and, in that event, no

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further or other conveyance of said property shall be necessary, and that such sale, whoever should become the purchaser, should be a perpetual bar in law and equity against Elliott, (the plaintiff,) his executors, administrators, and assignees. As to the mode of foreclosure, it was provided in a supplemental memorandum, amendatory of the previous defeasance, that in case Elliott failed to pay to Van Vechten, on demand, as the same shall become due, the sums which he then owed, or may thereafter owe him, it may be lawful for him to sell the property at public auction, at the Merchants' Exchange in the city of New York, upon notice of such intended sale, to be inserted in a newspaper published in the said city, once a day for thirty successive days, and without any further notice whatever; and, in a memorandum supplemental to, and amendatory of the defeasance agreement between the plaintiff and the defendants Wood, it is provided that the notice of sale to be given by them, instead of being a notice of thirty days, to be published in a newspaper, should be a notice of ninety days by leaving a copy thereof at a certain office or place of business in the city of New York, and by addressing another copy of said notice to Elliott at Baltimore, Maryland, or, if he should change his place of residence, then to such other as he may designate. The special term finds that, on failure of payment of the sums due to Van Vechten, the latter having given the notice required by the agreement between the plaintiff and said Van Vechten, he offered the said property for sale at public auction, at the Merchants' Exchange in the city of New York, at 12 o'clock, noon, and that the defendant, Ross W. Wood, having bid at said sale for said property, the sum of \$1200, and that being the highest bid offered, the property was sold to said Wood, and a deed of it was executed and delivered by Van Vechten to said Wood.

The special term also finds, with regard to the mortgage to the defendants Wood, that the latter, after having given

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the notice required by the amendatory agreement, offered the share and interest of the plaintiff in the said property for sale at the Merchants' Exchange in the city of New York, and that the said Ross W. and Richard D. Wood having bid for it, at said sale, the sum of \$25, and no other bid being offered, they purchased the said share and interest.

I. The counsel for the plaintiff contends, that the relation between the plaintiff and the defendants Wood, was that of *cestui que trust* and trustee, and that they were, therefore, incompetent to be purchasers of the property. Is the mortgagee of property, authorized by the mortgage to sell the property at public auction, and to be a purchaser of it at the sale, in that peculiar confidential relation to the mortgagor, which the law regards as a fiduciary relation, such as that of guardian and ward, attorney and client, trustee and *cestui que trust*? If any such relation can be supposed to have existed between the plaintiff and the defendants Wood, it must be on the ground that the one was the principal and the other the agents, for the sale of the property in question. In all cases, indeed, of purchases and bargains respecting property made between principals and agents, the utmost good faith is required. But a sale of his principal's property, purchased by an agent, is not necessarily void. The transaction should be, undoubtedly, scrutinized closely; but it is only voidable, where there has been undue influence and advantage, or where there has been imposition. It is different, certainly, where the strict relation of trustee and *cestui que trust* exists; and, in such case, the principle applies where a purchase has been made by a trustee, of the property of his *cestui que trust*; although it was sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether made *bona fide* or not. The relation in the present case I hold not to be of that character, and that, at most, it is only one of principal and

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agent; and, as no undue influence or advantage, or imposition has been shown, the sale is valid, unless other principles of law render it void.

II. Undoubtedly, courts of equity have always held that the equity of redemption is so inseparable from a mortgage, it cannot be disannexed even by an express agreement of the parties. But by statutes of the state it has been long declared that mortgaged land can be sold by advertisement, in all cases, where the mortgage contains a power to the mortgagee, or any other person, to sell it, upon default being made in any condition of the mortgage. Every sale pursuant to such a power is declared to be equivalent to a foreclosure and sale under the decree of a court of equity. As the law, however, looks upon the mortgagor as one who might, by his necessities, be driven to an improvident contract, it requires that the party availing himself of the power must conform to the requirements of the statute to bar the equity of redemption. For instance, the sale must be public, even when the mortgage contained a power to sell either by public auction or at private sale. (*Lawrence v. The Farmers' Loan and Trust Co.*, 3 Kern. 200.) The sale in the case which I have just noted, was private and secret, and without notice to the heirs or representatives of the mortgagor, by advertisement pursuant to the statute, or otherwise; and it was held to be void. Whether the Court of Appeals in that case held, that in every particular the method prescribed by the statute must be strictly followed, may be considered doubtful. For instance, that the notice of sale should be published for twelve weeks successively, and that the notice should be affixed at least for that time on the outward door of the building where the county courts are directed to be held in the county where the premises are situated. Is this necessary where the mortgage provides that the notice of sale shall be for a

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shorter time and in a different manner? I am inclined to think that in all cases it is only necessary that the sale should be public and not private; and that there should be notice. By this, the rights of mortgagors are sufficiently protected; and if they have themselves provided expressly for a time and manner different from that prescribed by the statute, and if the sale is in conformity with the provisions of the mortgage, it will be upheld, particularly when it is manifest that the method contained in such provisions is more likely to secure notice to the mortgagor, than the method prescribed by the statute. The mortgage to the Woods, or rather the supplement, provided that the notice should be given ninety days before the sale, and that to Van Vechten provided that it should be given thirty days before the sale; and, accordingly, these notices were given, as we have seen by the findings of the special term. The 7th section of the statute expressly declares that the mortgagee, his assigns, and his or their representatives, may fairly and in good faith purchase the premises at the sale; and as the section makes no exception, this can be done even when the mortgage contains no provision to that effect.

III. Does the usury in the loan from Van Vechten to Elliott affect the sale to the defendants Wood, under the foreclosure?

Both counsel have referred to *Jackson v. Henry*, (10 John. 195,) and both agree that an innocent purchaser, under a statute foreclosure, is not affected by the usurious character of the mortgage. But, the counsel for the plaintiff insists that this decision does not apply to the present case, as the mortgaged property is situated out of the state. As I have already said, however, in the introductory part of this opinion, I have regarded this mortgaged property, throughout, in analogy to the laws relating to the foreclosure of property within the territorial jurisdiction of the state. The parties, evidently, in their dealings and

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agreement, meant that it should be regarded in this light.

The decision in *Jackson v. Henry*, has been recognized in several recent cases; and I deem it now satisfactorily settled that as usurious contracts are not absolutely void, but are capable of being treated as valid by the borrower, if the mortgagor allows the property to be sold under a foreclosure, without taking the necessary measures to avoid the mortgage, an innocent purchaser cannot be affected by the alleged usury.

The judgment of the special term should be reversed, new trial ordered, costs to abide event.

[NEW YORK GENERAL Term, January 4, 1869. *Clerke, Sutherland and Geo. G. Baynard*, Justices.]

THE WASHINGTON LIFE INSURANCE COMPANY vs. HANNAH
M. LAWRENCE and MAGGIE RICHMOND.

In the year 1861 D. L. Jr. effected an insurance on his life, with the plaintiff, for \$5000. In November, 1862, being under a promise of marriage to M. R. he assigned the policy to her, and notified the plaintiffs thereof, and the policy was marked on the books of the company as assigned to her. In 1863, the insured, not having the money to continue the payments of premiums, his uncle, D. L. promised to keep the policy paid up if it was for the benefit of the insured's mother and sisters, otherwise not. The insured promised to send D. L. the policy immediately. He soon after applied to M. R. who had the policy, to send it to him, as he had heard it had expired. She did so send it, and the insured sent it to D. L. In April, 1864, he made an attempt to have the policy put in his mother's name on the plaintiffs' books, and being told that M. R. must reassign it to him, or to his mother, he applied to M. R. for an assignment of the policy in order to renew it, saying it had expired. She thereupon executed an assignment to him, without asking why he wished it; saying she "had confidence in him and gave him her signature."

Held that upon these facts there was no fraud or deception practiced by the insured, in procuring the assignment of the policy from M. R. and that the judge was justified in so finding.

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THIS action was brought to compel the defendants to interplead concerning the moneys payable under a policy of life insurance issued to Daniel H. Lawrence, Jr. the several defendants having commenced each her separate action against the company, claiming said moneys. The policy referred to was issued by said company and dated January 25, 1861, and is numbered 347. Judgment of interpleader was rendered, and issues having been framed, the same were tried by consent of parties, at a special term, before Justice CLERKE, without a jury; who found and decided as questions of fact, that on the 25th day of January, 1861, the plaintiffs made and executed a policy of insurance upon the life of Daniel H. Lawrence, Jr. known as number 347, by which they assured to him the sum of \$5000 for the term of his natural life; and that the said policy was obtained by Daniel H. Lawrence, on an understanding with, and promise to her that the same should be held for the benefit of Hannah M. Lawrence, who was the mother of Daniel H. Lawrence, deceased. That on procuring such policy, he gave and delivered the same to his mother, Hannah M. Lawrence, who received and accepted the same from him as a gift, and provision for her use and support in case of death. That she, the said Hannah M. Lawrence, continued to hold and possess said policy, until the summer of 1862, when she requested the said Daniel H. Lawrence, Jr. to take such policy and deposit the same in the safe in the store of his uncle, Daniel H. Lawrence, who was a member of the firm of Lawrence, Griggs & Kingsbury, to be safely kept for her. That Daniel H. Lawrence, Jr. was at that time in the employ of said firm, where the policy was so deposited, and became afterwards interested in the business of such firm, and had access to such safe; that the policy was deposited in said safe, and remained there until the month of November, 1862, and that about the 28th day of that month, without the knowledge or consent of the said Hannah M.

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Lawrence, the said Daniel H. Lawrence, Jr. took such policy and delivered the same to the defendant Maggie Richmond, with an assignment in writing, of which the annexed paper marked schedule A, was a copy, of which notice was given to the plaintiffs, and that the policy so remained in the possession of said Maggie Richmond, until on or about February, in the year 1864, when she sent the same by mail to the said Daniel H. Lawrence, Jr. to Winona, in the state of Minnesota, where the said Daniel H. Lawrence was then staying for his health. After the policy was so sent, the defendant, Hannah M. Lawrence, who was also at Winona, taking care of the assured, had the same in her possession a short time, when it was forwarded to Daniel H. Lawrence, at New York. That Daniel H. Lawrence, who is the brother of Hannah M. Lawrence, before the policy was sent, wrote to Daniel H. Lawrence, Jr. that if the policy was for the benefit of his mother and sister, he, Daniel H. Lawrence, would pay the premiums, thereon, and not otherwise. That he was assured that it was to be held for their benefit, and that thereupon he paid the premiums, in January, 1864, and April 1864; that the assignment to Maggie Richmond was detached from the policy before sending the same to Daniel H. Lawrence, in New York, by the assured, and was found in his pocket book after his death, and that neither the said Daniel H. Lawrence, or the said Hannah M. Lawrence had any notice or knowledge of any assignment. That Daniel H. Lawrence, Jr. the assured, wrote to a friend of his to have the policy transferred on the books of the company, to his mother, Hannah M. Lawrence, and was informed that it could not be done unless Maggie Richmond re-assigned the policy to the assured or else assigned to said Hannah M. Lawrence. That after the policy was sent to Daniel H. Lawrence, in New York, he advanced on the credit thereof, to the said Daniel H. Lawrence, Jr. and to his mother, at his request, \$600 or

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\$700, besides the payment of the premiums. That on the return of Daniel H. Lawrence, Jr. to New York, in feeble health, he called on Maggie Richmond for an assignment to him of the policy, which she executed to him, of which she also signed a written notice to the company. And that on the 28th day of May, 1864, Daniel H. Lawrence, Jr. executed the assignment of the policy to Daniel H. Lawrence, a copy of which was annexed. That Daniel H. Lawrence asked him whose name should be put in as assignee, whether the name of his mother or Daniel H. Lawrence, and that he concluded to have the latter inserted. That there was an understanding between Hannah M. Lawrence and Daniel H. Lawrence, the elder, that the mother the of deceased should have the benefit of the policy after repayment to Daniel H. Lawrence of his advances. That Daniel H. Lawrence, Jr. died on the 15th day of June, 1864, at Morristown, in the state of New Jersey; and the company have paid into court the amount insured in said policy, less the costs allowed to them in this action; that all the claims arising on or under such policy, were assigned by Daniel H. Lawrence to Hannah M. Lawrence, on the 8th day of October, 1864. The justice found, as a conclusion of law on the foregoing facts, that in equity and of right, the fund in court in this action, and which was paid upon said policy, belongs to the said Hannah M. Lawrence, and that she is entitled to the same. And he further found, that the said Hannah M. Lawrence was entitled to recover of the said Maggie Richmond, her costs and expenses in this action, to be adjusted.

Judgment being entered accordingly, the defendant, Maggie Richmond, appealed to the general term.

Wm. Fullerton, for the appellant. The policy of insurance issued by the plaintiff to Daniel H. Lawrence, Jr. and bearing date January 25, 1861, was a contract to pay a certain sum of money upon the happening, at some

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uncertain time in the future, of a possible contingency (of death under circumstances other than such as are therein excepted) and upon condition of performance and observance of the terms, conditions and provisions of such contract therein expressed.

II. The assignment by Daniel H. Lawrence, Jr. to the defendant Richmond was a valid and effectual assignment of the contract or policy in question; and the title to, and all his interest, claim and demand in or under the same, *passed to and vested in the said defendant absolutely.* (*St. John vs. American Mutual Life Ins. Co.* 13 *N. Y. Rep.* 31.) 1. The same was in writing, duly executed and for a *valuable consideration expressed* in the instrument of assignment. 2. The instrument of assignment, together with the contract therein referred to annexed, was delivered by said assignor to the defendant. 3. The conditions of the contract, applicable to assignments, was in all respects complied with by notice to the company thereof, and their assent thereto.

III. The express acknowledgment and declaration by the assignor, in the instrument of assignment, that value was received therefor, is in itself proof of a valuable consideration, and no affirmative evidence *aliunde*, of consideration is requisite. Moreover, said assignor, and all claiming under him, are thereby *estopped* from denying his own act or such consideration, and the same cannot be inquired into or questioned. No fraud or mistake is alleged or proved, and there is in the case affirmative evidence, *aliunde*, of a valuable consideration sufficient of itself to support said assignment. 1. A promise of marriage is clearly proved. The letters of the deceased to the defendant Richmond, contain evidence of a mutual promise of marriage, and the language and expressions used are as clear and strong as language can well convey, and conclusive on this point, and also that the time for solemnization of the marriage had been fixed by the parties, and

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that the same was to be solemnized on his return home, not later than 1st October, 1863. The fact of mutual promises and agreements to marry is conclusively proved, and existed prior to date of ex. No. 5. These constitute a contract for breach of which not only are damages recoverable at law, but such promise constitutes in law a valuable consideration for a deed or instrument of conveyance or transfer. Pecuniary damages being recoverable for a breach, is the test that the "promise" (of marriage) is valuable. (*Jones v. Ashburnham*, 4 East, 455. *Lent v. Padelfora*, 10 Mass. R. 236. *Seaman v. Seaman*, 12 Wend. 381. *Morton v. Brown*, 2 Neville & Perry, 297. 2 Adolph. & Ellis, n. 5, 859.) 2. Even a mere voluntary conveyance would be upheld in equity against subsequent grantees taking under circumstances which accompany and surround the assignment by deceased to his uncle, and by the latter to the defendant Lawrence. The transaction being a fraud as against the defendant Richmond, practiced by deceased, and concerning which, if the uncle and the defendant Lawrence had not actual notice, they had legal constructive notice, and were put on inquiry, and were bound to exercise diligence and to inquire, and took without consideration. (*Cathcart v. Robinson*, 5 Peters, U. S. 280. *Jackson v. Town*, 4 Cowen, 603, 604.)

IV. Said contract and assignment remained in actual possession and custody, and control of the defendant Richmond, until February, 1864, and was held by her, (as she is still entitled to hold the same,) as the absolute and only owner thereof.

V. The possession or custody of said contract and policy was obtained by Daniel H. Lawrence, Jr. from the defendant Richmond, by means of false and fraudulent representations made, and deceit practiced by him, and with intent and design to cheat and defraud said defendant Richmond; and no title passed thereby.

VI. The signature of the defendant Richmond to the

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alleged assignment by her, and to the notice, was procured by said Daniel H. Lawrence, Jr. by means of false and fraudulent representations made, and deceit practiced by him; and, with intent and design to cheat and defraud said defendant Richmond. And no title or interest in said contract passed thereby.

VII. No title to or interest in said contract passed by the alleged assignment thereof by said Daniel H. Lawrence, Jr. to his uncle; nor by the alleged assignment of the claim in action herein by his uncle to the defendant Lawrence. An assignor cannot convey any greater or better title than he himself has; and an assignee takes subject to any and all claims and defenses existing against his assignor. (*Westfall v. Jones*, 23 Barb. 9. *L'Amoureux v. Vandenburg*, 7 Paige, 316.) Fraud vitiates the contract, as to the assignees, to same extent as to the assignor, and no title can be acquired through fraud. No valuable consideration was paid or parted with to said Daniel H. Lawrence, Jr. for such alleged assignment by him to his uncle; nor to said uncle for the alleged assignment by him to the defendant Lawrence. The first is avowed by the uncle to have been so assigned as a "mere matter of convenience;" and the latter paper, it is in effect conceded, was made without any actual consideration. It is not pretended that any purchase of the policy was made or contemplated; nor is it even pretended that any money was paid by way of consideration or price of such policy or contract. On the contrary, the language used by the witness himself describes a transaction of an entirely different character, a loan or "advance" on "collateral." He not only says the assignment was made to him as a mere matter of "convenience," but also that he had "advanced" on the "strength of getting the policy," and on the understanding that it was "for the benefit of the mother and sisters of deceased;" all which is wholly inconsistent with any idea of "purchase." The instrument was not negotiable,

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and he not only took it subject to all claims and defenses maintainable against his assignor, but was bound to the exercise of diligence and inquiry concerning the title and right thereto. (*Commercial Bank v. Colt*, 15 Barb. 506. *Evans v. Ellis*, 5 Denio, 640. *Murray v. Lyburn*, 2 John. Ch. 441.) He had constructive legal notice, if not actual notice, of the rights and title of the defendant Richmond in and to said policy or contract, and was put upon inquiry concerning the same. 1. His own testimony, to the effect that he had written to deceased that "if the policy" was for the benefit of his mother or sister, he (the witness) would pay the premium, and not otherwise, indicates the existence of either knowledge or information, or suspicion that it was otherwise. 2. On the face of the policy appeared prominently the clause requiring notice of any assignment thereof to be given to the company, and the same is made a condition of the contract. Therefore if any existed he knew it could there be ascertained, and was bound to inquire.

VIII. The court erred in finding as facts that the policy in question was taken out for the benefit of the defendant, and in each and every of the findings of facts excepted to.

IX. The court erred in the conclusion of law that the fund in court belonged to the defendant Lawrence, and that she was entitled to the same, and also in that the court adjudged that the defendant Lawrence should recover costs, &c.

W. F. Allen and *H. Brewster*, for the respondent *H. M. Lawrence*. I. The title and property in the policy was, from its first issue, in *Hannah M. Lawrence*, and her title has never been relinquished or divested. It was obtained for her benefit and with the sole intent to devote it to her use, and in accomplishment and execution of this intent, it was formally given to her and put in her actual possession. It was actually delivered to her, and remained

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in her possession for years. It was an executed gift, which could not be revoked by the donor without the consent of the donee. The consideration, (love and affection for a mother, partially dependent upon the donor,) was sufficient to support the gift, if any consideration were necessary as between donor and donee, which we suppose was not. Like any other chose in action, it was transferrable by delivery without a formal assignment. From the time of the delivery, the transferrer became, and his executors after his death would have become the trustees of the donee. The formal assignment to Daniel H. Lawrence, and by him to the plaintiff, added nothing to the validity or equity of the plaintiffs' claim in this view of the case. They simply operated to place the legal and formal ownership in the person having the actual and equitable title.

II. This title of Mrs. Lawrence was never divested or relinquished. It could not be divested without her act and assent, or by act and operation of law. She delivered the policy to the insured for a special purpose, but never parted with the title, and the possession of Daniel H. Lawrence, Jr. for this special purpose, was her possession, he holding it as her agent. It needs no argument to prove that Daniel H. Lawrence, Jr. acquired by that act of Mrs. Lawrence no rights or interests in the policy as against her. Every payment of the quarterly premiums was for her benefit, and a keeping alive of the policy for her benefit. Had he not paid, she might and would have done so. Had he or his representatives asserted a claim to the policy as against her, they would not have succeeded.

III. It follows that Daniel H. Lawrence, Jr. having as against Hannah M. Lawrence no title or claim to the policy at law or in equity, could transfer no title or claim to any other person, no matter what the relations were between them, or the considerations moving from one to the other. The assignee of a chose in action, even upon a

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full and valuable consideration, takes subject to all the equities existing against the transferrer in behalf of any other person. But here there was no valuable consideration for the transfer. It was voluntary, the assignee parting with no value and coming under no engagement as a consideration for it. It necessarily follows that she merely took title of Daniel H. Lawrence, Jr. whatever that was, and as against the respondent it was just nothing at all and of no value. Here the case on the part of the respondent might safely rest, but the defendant Richmond is in no better situation upon the claim and title alleged by her.

IV. Conceding that Daniel H. Lawrence, Jr. became so possessed of the policy by the delivery of the same to him by the respondent, that he could by gift transfer a good title thereto to the defendant Richmond, and that he did so, and the policy became hers as the voluntary donee thereof, she lost her title when, by her voluntary act and consent, she relinquished her title, 1st, by a surrender of the policy to Daniel H. Lawrence Jr. and 2d, by a formal assignment to him. The inducement to her acts is not material. She was not a holder for value, and intended to, and did release her claim. If the respondent, by a special delivery, without intending to part with the title, could lose her interest in the policy, which the appellant must assert and maintain before she can show even a color of title, much more did she lose her title when she parted with the possession, intending to and actually parting with her title.

V. Concede further that which cannot be established, that she could have reclaimed the policy and compel a reaffirmance of a gift which had been revoked with the assent of the donee, so long as the policy remained in the hands of Daniel H. Lawrence, Jr. or subject to his control, the same right does not exist as against the respondent.

1. The trust for her benefit could and did revive the interest the moment the title thereto was formally and

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nominally re-invested in Daniel H. Lawrence, Jr. 2. Daniel H. Lawrence became the assignee then for the benefit of the respondent for a valuable consideration. He paid the renewal premiums, without the payment of which the policy would have terminated, solely for and in consideration of the policy being held for the use of the respondent. 3. He advanced other sums upon the faith of the policy as a valid security in his hands.

The pretense of fraud in procuring the re-assignment by the defendant of the policy to Daniel H. Lawrence, Jr. is absurd. No one for a moment believes the defendant, her politic mother, or her shrewd uncle, all present, could have been made to believe that a policy already ended would be renewed, or a new policy issued upon the life of a man with one foot in the grave, and who could not live to see another quarter day. And fraud or false pretenses is only to be alleged in favor of a right founded on value.

VI. That the money loaned to deceased, for which he gave his note, had any connection with this policy, was never claimed, and the assignment of the policy to Maggie Richmond was in November, 1862, and the note transaction was in 1863 or 1864. Hence, if she gave the policy back for nothing, it left her just where she was before. The deceased loved her, but had received nothing but affection in return. She has a mother and friends. The respondent is a widow, and had nursed the deceased from infancy, and again when sick, had nurtured and cared for him. Can there be any doubt as to which has the better equity?

VII. The exceptions are none of them well taken.

By the Court, G. G. BARNARD, J. I am unable to concur with the learned judge, who tried this action, in his finding that on procuring the policy in question, Daniel H. Lawrence, Jr. gave and delivered the same to his

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mother as a gift and provision for her use and support in case of his death. The defendant, Mrs. Lawrence, does not claim such a title in her pleadings, but claims solely under the assignment from Daniel H. Lawrence, the uncle of the insured. The only evidence of the gift to the mother is her own testimony, and is simply that this policy was delivered to her by her son, the insured, within a few days after it was taken out, as a policy made for her benefit. That she kept it about a year and delivered it to her son to be placed for safe keeping in the safe in his uncle's store. The insured was childless and unmarried, and had no father.

It is more reasonable to infer from his testimony that the policy was delivered to his mother as the person who would recover the money upon it after his death, under the statute of distributions, than upon such uncertain language to find a present transfer of the title to the policy itself. In this view of the case, it is not necessary to examine the force of the objection to the admissibility of her testimony. It fails to prove the fact which it was admitted to prove, and is therefore harmless. No other error is alleged to have happened upon the trial, in admitting or rejecting evidence, and the case must be determined irrespective of the gift to the mother, so found at special term. The facts are few and mainly undisputed. The one decisive fact is in dispute. In the year 1861, Daniel H. Lawrence, Jr. effected the policy with the plaintiff for \$5000. In November, 1862, he was under a promise with the defendant Maggie Richmond to marry her. On the 28th of November, 1862, he assigned the policy to her, of which notice was given soon thereafter to the plaintiffs' company, and the policy was marked as assigned to her, upon the books of the company. In the latter part of 1863 the insured had not the money to continue the quarterly payments of premium, and his uncle, Daniel H. Lawrence, promised to keep the policy paid up if it was for the benefit

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of his mother and sisters; otherwise not. That the insured promised to send his uncle the policy immediately. That soon thereafter he applied to the defendant Richmond, who had the policy, to send it to him as he had heard it had expired. She did so, and upon its receipt by Daniel H. Lawrence, Jr. he sent it to his uncle. In April, 1864, the insured made an attempt to have the policy put in his mother's name on the insurance company's books, and was told that Miss Richmond must re-assign it to him or to his mother. On the 28th of May, 1864, she re-assigned the same to him. The disputed question is, whether this assignment was procured by fraud or deceit. The court has not found that any fraud was practiced to procure the same. I think it was justified in so finding. Two witnesses are called, both of whom testify that the insured said to Miss Richmond that the policy had expired, and asked her for an assignment in order to renew it. One of these witnesses is the young lady's mother. She testifies in another portion of her testimony that her daughter "gave him her signature without asking why he wished it; she said she had confidence in him and gave him her signature." If this was true there was no fraud or deception. The judge has so found. It is not the province of an appellate court to review the decision, upon appeal, where the evidence is conflicting. The defendant Lawrence, makes a title to the policy, beyond dispute, if the assignment from Miss Richmond was voluntary and not obtained by fraud. The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Sutherland and George C. Barnard, Justices.*]

WILLIAMS and others vs. LAWRENCE and others.

Where part owners of a vessel then under a charter to a foreign government, assigned to the plaintiffs all their interest in said charter, and in and to the freight to be earned under the same; *Held*, in an action brought by the plaintiffs to recover their share of the freight earned by the vessel, during the last voyage, that such freight was subject to an accounting between the several co-owners, for all previous voyages; it appearing that the former voyages and the one in question were all one entire, connected and continued partnership transaction. And that the rights of the plaintiffs, as assignees, were only in and to the balance, which on a settlement of the accounts of said several voyages, between said co-owners, might be found due to the plaintiffs as such assignees.

ON the 20th day of December, 1859, Howes & Co. who were owners of one half the ship *Wanderer*, then under a charter to the Peruvian government to go to the Chinch Islands, take on a cargo of guano, and carry the same to Hampton Roads, assigned to the plaintiffs all their interest in the said charter, and in and to the freight to be earned under the same, to be applied, when received by the plaintiffs, to the payment of a demand they held against Howes & Co. as ship's husbands for supplies before that time furnished the *Wanderer*. This indebtedness at the time amounted to \$15,000. The freight was earned under the charter after the assignment, and amounted to \$11,074.13 net. This money was deposited with Charles L. Benedict to be disposed of according to the rights of the several parties, to be established. The other defendants represent the other part owners of the ship. The action was brought to recover the one half of the net freight, being the fund in the hands of Mr. Benedict.

The defense interposed was that at the time of the assignment Howes & Co. as part owners and ship's husbands, were indebted to their co-owners on account of prior voyages performed in the years 1856, 1857 and 1858, in an amount exceeding the half of the net freight realized under the Peruvian charter.

The referee before whom the cause was tried, decided

that the freight earned by the last voyage was subject to an accounting between the part owners for all previous voyages, and that as such accounting would show a balance against Howes & Co. to an amount greater than half the net freight in question, nothing passed to the plaintiffs by the assignment, and ordered judgment for the defendants, from which the plaintiffs appealed to the general term.

Erastus Cooke, for the appellants. I. The right of a part owner of a ship is not that of a partner or joint tenant, but of a tenant in common. The rights of the part owners are several. (*Merrill v. Bartlett*, 6 Pick. 46. *Abbott on Shipping*, 107, *marg. p.*)

II. Neither are the part owners partners generally in the earnings of the ship. Each voyage is a distinct and independent partnership venture unconnected with any other, and no claim growing out of, or balance of accounts upon any voyage gives the creditor a lien upon the debtor's interest in a subsequent voyage. This doctrine is distinctly held in *Nicoll v. Mumford*, 4 John. Ch. 522.) The note to this case is as follows: "But when one joint owner of the freight and cargo of a particular vessel, on a particular voyage, assigns his interest therein, one of them who has got possession of the whole proceeds cannot retain the share so assigned to satisfy claims he may have against the other arising from former and distinct voyages or adventures in which they may have been concerned together in the same or other vessels, they not being general partners in trade, and there not being any connection between the different voyages or adventures." (*See also Story on Part.* §§ 441, 444, 448; 3 *Kent's Com.* 155, 5th ed.; *Braden v. Gardner*, 4 Pick. 456.)

III. The plaintiffs, who were mortgagees of the one half interest in the ship, bought out the interest of Howes &

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By the Court, GEO. G. BARNARD, J. The plaintiffs, by their assignment from Howes & Co. got no other or greater right than Howes & Co. would have had if no assignment had been made, as against the co-owners of the vessel. The assignment was given by Howes & Co. by way of mortgage to the plaintiffs to secure a precedent debt, and only purported to convey the interest of Howes & Co. in the charter. It is not disputed but that Howes & Co. at the time of the assignment were largely indebted to the other co-owners for the earnings of the vessel on previous voyages. There is no pretense that the former voyages were carried on upon any different principle or understanding than the voyage in question. The former voyages and the voyage in question were all one entire, subsisting, connected and continued partnership transaction. In *Nicoll v. Mumford*, (4 John. Ch. 522,) there was proof that shortly before the voyage then in question, the ownership of the vessel was different from the ownership existing at commencement of the voyage. The chancellor held that there was no necessary connection between one voyage and any former voyage, and under the facts of that case, that proof of such connection should have been given. There is no doubt in this case but that as to all former voyages an account is to be taken as between partners, in respect to the freight and cargo. The interest of each partner is his share of the surplus, subject to all partnership accounts, and that interest is surplus only and is liable to the separate creditors of such parties claiming either by assignment or under execution. No separate creditor of one party can be entitled to more than the person in whose place he stands. (*Nicoll v. Mumford*, 4 John. Ch. 522.) It follows that the judgment is right, and should be affirmed, with costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Swickland and Geo. G. Barnard, Justices.*]

FRITH and others vs. CAMPBELL and others.

Where an action is instituted to prove a will, under the revised statutes, executed according to the laws of this state, the original will being in the possession of an English court of probate, and no defense is interposed, the answers admitting the allegations of the complaint and joining in a prayer for probate here; and no trial has been had, no extra allowance can be made in the judgment, to the attorneys appearing in the action.

As to the defendants' attorneys, in such a case, the court has no authority to give any thing, except for costs; and the plaintiffs being executors, and having, in the execution of their duties as such, employed attorneys to prosecute the suit, the estate must indemnify the executors for their necessary expenses, including counsel fees reasonably and properly paid. And for such sum as the attorney can establish at law as the value of his services, he has his action against the executors.

The executors may pay their attorney such sum, therefor, as they are satisfied will pass on the final settlement of their account.

But the court should not allow an amount which would be unreasonable if the executors had paid it without the order of the court.

Held, in this case, that the plaintiffs, as executors, would not have been justified in paying \$3000 as counsel fees in an action to obtain the probate of an uncontested will.

THIS action was brought by the above named plaintiffs against the above named defendants, (who all, excepting Thomas S. Furniss and Edward Tozer, are the heirs-at-law and personal representatives of Edward F. Sanderson,) to have the will of the said Edward F. Sanderson proved in this court as a will of real and personal estate, under a commission to be issued for that purpose, as provided by part 2, chapter 6, title 1, article 3, sections 78, 79, &c. (original §§, 63, 64, &c.) of the Revised Statutes, marginal page 67, page 131 of the third edition. The summons and complaint were served on the defendants, S. E. Campbell and F. A. Johnson, on the 1st day of March, 1867, and they appeared by Robert B. Campbell, their attorney. The other defendants all appeared voluntarily by Frederic W. Stevens, their attorney, and all the defendants answered, joining in the prayer of the complaint.

A commission was issued accordingly, directed to Geo.

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J. Abbott, Esq. American consul at Sheffield, England, authorizing him to take proof of the execution of said will and codicil. Subsequently, the commission having been returned, duly executed, and the facts necessary to establish the validity of said will as a will of real and personal estate, appearing from the proofs taken under and by virtue of such commission, the court, at special term, declared adjudged, and decreed that such will was duly proved, as a will of real and personal estate within the state of New York; and that an exemplified copy thereof be recorded in the office of the clerk of this court; that such decree should be transmitted to the surrogate of Westchester county; that such surrogate record the same in his office and issue letters testamentary or of administration, with the will annexed thereon, in the same manner as upon wills duly proved before him.

By an amendment of the judgment it was further ordered, that the sum of \$3000 be allowed to the plaintiffs' attorney, besides his costs to be taxed, and that the sum of \$250 be allowed to each of the attorneys for the defendants, besides their several costs to be taxed, for the services rendered herein by the said respective attorneys, and that the several allowances and costs be paid out of the estate of the said Edward F. Sanderson, deceased.

The defendants appealed from the judgment.

Robert B. Campbell, for the appellants.

G. M. Spier, for the respondents.

By the Court, GEO. G. BARNARD, J. It is very clear that the allowances made in the judgment to the attorneys appearing cannot be upheld under the Code. There was no defense interposed, and of course there could be no trial had. The action was instituted to prove a will under the Revised Statutes, executed according to the laws of this

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state, the original will being in the possession of an English court of probate. The answers admitted the allegations of the complaint and joined in a prayer for probate here. Section 309 of the Code did not, therefore, apply. The allowances to the defendants' attorneys, must, therefore, of necessity be reversed. As to them the court had no authority to give any thing except for costs. The attorney for the plaintiffs had rendered valuable services; the plaintiffs are executors; the service has been performed upon the employment of the plaintiffs and in the execution of their duties as executors, and the rule undoubtedly is that the estate must indemnify the executors for their necessary expenses, including counsel fees reasonably and properly paid. (*Downing v. Marshall*, 37 N. Y. Rep. 380.) I think the amount allowed unreasonable. The plaintiffs, as executors, would not have been justified in paying \$3000 as counsel fees in the action to obtain the probate of this uncontested will. The court should not allow an amount which would be unreasonable if the executors had paid it without the order of the court. The plaintiffs' attorney has his action against the executors for such sum as he can establish at law as the value of his services. The executors may pay their attorney such sum, therefor, as they are satisfied will pass on final settlement of their accounts. Instead of fixing an amount for the counsel fees of the plaintiffs' attorney, allowing what would be proper if the trust estate was to be removed from the plaintiffs' hands, it is best to reverse the order making these allowances and leave the attorney for the plaintiffs to establish his right in a more formal and recognized manner.

Order reversed, without costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Ingraham and Geo. G. Barnard*, Justices.]

ADLINE HAVENS, adm'x and David Brundage, adm'r, &c.
vs. THE ERIE RAILWAY COMPANY.

Upon a bill of exceptions the court can only review the legal decisions made at the circuit, and those only so far as they were duly excepted to.

It is not the duty of a judge, at the circuit, in response to requests, to go over again the very ground or questions covered by the charge as given; and it is not the right of counsel, when the charge is ended, to seek to get a repetition of a leading idea already fairly expressed, by a request to charge upon it anew, or in some little different phraseology, so as to get in that shape a virtual re-argument of the facts before the jury. *Per* E. D. SMITH, J.

In an action against a railroad company, by administrators, to recover damages for the death of their intestate, caused by the alleged wrongful act, neglect, &c. of the defendant, the judge charged the jury that persons approaching a railroad in plain sight are bound to look and see if any train is coming; that if they look up and down the road as men of ordinary prudence would do in traveling near a railroad, and are not negligent, the plaintiffs, in an action against the railroad company, for damages, are entitled to recover, if the persons in charge of the railroad were negligent. *Held* that this was a correct statement of the rule in respect to the conduct of a plaintiff, in such cases.

It is not a question of law how far a man should look, in such a case, but he must use his eyes and his ears, in view of the circumstances, as men of ordinary prudence would do in like cases. And this rule is one for the jury to apply.

It is not error for a judge to refuse to charge that "it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by." The statute having provided that this—"far enough to warn passers by"—shall be eighty rods, the jury have no right to change the rule as thus fixed.

THE questions presented in this case arose upon a case and exceptions ordered to be heard at the general term in the first instance. The action was tried before Justice Johnson and a jury at the Steuben circuit, in November, 1867. The action was brought under the statute, to recover of the defendant damages for causing the death of James Havens, the plaintiffs' intestate, which occurred in November, 1867, while riding in a wagon with one Gorton, and was occasioned by coming in contact with one of the defendants' eastward bound trains, on what is known as Bennett's Crossing, in the town of Corning, county of

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Stenben. Two questions arose, and were litigated on the trial; one was whether the deceased himself, or Gorton, who was driving the wagon, was negligent in the exercise of requisite care in approaching the crossing. Upon this point it was proved that the deceased, with Gorton, met parties on the highway twelve rods from the crossing, and although Gorton testified that between the place of that meeting and four or five rods from it towards the crossing he turned around, looked for a train once, and but once; saw none; that he gave attention to the signals the company were required to give, and he heard none.

Upon the question of care which the deceased was bound to exercise, the judge submitted to the jury to find whether, if Gorton and the deceased after going within eight, ten or twelve rods of the crossing looked up the road and saw no train, and heard none, it would be ordinary prudence to go on the track, looking down the road for a train coming in that direction, and charged that men approaching a railroad in plain sight are bound to look and see if a train is crossing; but at the conclusion of his charge, at the request of the plaintiffs' counsel, he charged the jury that the deceased was not bound to stop and look up and down the road, unless there were signals given; and if they heard no signals they would have the right to think there was no train within eighty rods; and refused to comply with a request then made by the defendants' counsel to charge the jury that if the deceased might, at any point within ten rods of the crossing, have easily seen the approaching train, nearly a mile off, he was bound to survey the space, or in other words to look up the road, and if by omitting so to do he lost his life, the plaintiff could not recover; and to his refusal the counsel for the defendants excepted. The other question litigated was whether the defendants were negligent in omitting to cause the bell upon their locomotive to be rung as the train approached the crossing. Upon this question there was

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a conflict in evidence. One of the defendants' witnesses testified that it rung thirty rods from the crossing. The map shows a ringing post to be 412 feet from the crossing. The judge, in his charge, stated to the jury that the statute required the defendants to ring the bell *continuously*, from a point eighty rods from the crossing, and then charged them if the defendants rung it *the whole distance* the defendants were not guilty of negligence, and refused to charge that it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by; and to his refusal so to charge the counsel for the defendants excepted. The judge in the course of his charge to the jury warned them not to "overlook the fact that men commonly pay some attention to their own safety, to their own lives; and there is nothing in the case to show that these men intended to commit suicide, or that Gorton intended to have Havens killed." In referring to the care travellers were bound to exercise in approaching a train, he said, "they cannot look both ways at once."

The jury rendered a verdict for the plaintiffs for \$1300.

Brown & Graves, for the plaintiffs. I. The evidence upon the trial was abundantly sufficient to support the verdict. It appeared, 1. That the defendants' train, which caused the death, approached the crossing out of its regular and advertised time and was going at an unusual and very high rate of speed. 2. No signal of any kind was given to warn the plaintiff and Gorton, (who was driving,) of the approaching train. 3. Havens was properly and rightfully traveling in the public highway and without any fault or negligence on his part or on the part of Gorton was killed by being struck by the defendants' locomotive. Gorton looked up the railroad to see if a train was approaching and saw none. He listened and heard no sound. Then looking down the railroad to see if a train was coming

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from that direction and seeing none, passed upon the crossing. 4. The deceased left a widow and five children, for whom he provided. The evidence presented merely questions of fact upon which the finding of the jury is conclusive. (14 *N. Y. Rep.* 310. 13 *id.* 533. 36 *How. Pr.* 84.)

II. The offer of the defendants' counsel to prove, by the reports made to Elmira, and by the dispatches at that place, that the reports from Corning showed that the train left that place on time, was properly disposed of by the court. 1. The evidence was merely hearsay evidence, and consequently inadmissible. 2. The term hearsay is used with reference to that which is written, as well as to that which is spoken. 3. This testimony was offered not merely to prove whether such things were written or spoken, but to show that what was telegraphed was true. 4. If the evidence had been received it would have shown no other fact than that the dispatch was received at Elmira. 5. It was concerning a matter not wholly within the knowledge of the witness, but depending upon the truth or falsity of what others had reported. 6. In its legal sense, hearsay evidence denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. As thus described it is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. (1 *Greenleaf's Ev.* p. 128, § 99. 1 *Phil. Ev.* 185. *Penfield v. Carpenter*, 13 *John.* 350. *Irvine v. Cook*, 15 *id.* 239. *People v. Parish*, 4 *Denio*, 153. *Phillips v. Thompson*, 1 *John. Ch.* 131.) 4. In this case the defendants offered to show by the receiver of the dispatch at Elmira, the truth of a fact which may have gone through a dozen hands before he received it, and the truth of which depended upon the truth and veracity of, 1st. The person or persons who reported it to the operator at Corning. 2d. The person who telegraphed

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it to the witness at Elmira or to the office in which the witness was engaged. Such evidence is clearly hearsay and incompetent. (*See cases and authorities last above cited; also Alexander v. Mahon*, 11 John. 185; *Bristol v. Dann*, 12 Wend. 142; *Woodward v. Paine*, 15 John. 493. The offer of the defendants' counsel to show that the report was received at Elmira immediately upon the departure of the train from Corning, and before the accident, is liable to the same objections, and was properly disposed of by the court. (*See authorities last cited.*)

III. The request of the defendants' counsel, for the court to charge the jury, "That if the deceased might at any point, within ten rods of the crossing, have easily seen the approaching train nearly a mile off, he was bound to survey the space, or in other words, to look up the road, and if by omitting so to do he lost his life, the plaintiff cannot recover," was properly denied by the court, and the exception thereto was not well taken. 1. The court had already distinctly charged that "in order to entitle the plaintiffs to recover, they must go further" (than showing negligence of the defendants) "and show that the accident occurred without any fault or negligence on the part of the deceased or of Gorton who was with him and driving, which contributed to the injury." 2. The court had no right to charge upon the hypothesis of the counsel which assumes that the train might have been seen for nearly a mile off, at any point within ten rods from the crossing, which assumption is plainly contradicted by the evidence. It also assumes that the deceased and Gorton omitted to look up the road previous to crossing the track, which assumption is contradicted by the proof, and the evidence that they looked and listened is in no way contradicted. 3. The question of negligence on the part of the deceased, and of Gorton, was a question for the jury, which they were to determine in view of all the facts and circumstances of the case, and the court could

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not in justice limit the plaintiffs' right to recover by any single act or omission. 4. And never is the question of negligence taken from the jury and decided by the court when there is any conflict of testimony. Nor unless there is a plain and clear case of undisputed negligence on the part of the injured person. (36 *N. Y. Rep.* 132. 35 *id.* 10. 26 *How.* 177. 23 *id.* 168. 13 *N. Y. Rep.* 533. 36 *How.* 84. 2 *Stark. Ev.* 973. 30 *How.* 219. 40 *Barb.* 193.) 5. They were not bound to look up the road, (although it appears that Gorton, who was driving did,) if no signals were given, but had the right to assume that no train was approaching within eighty rods, without, as a matter of law, the imputation of negligence. (*Ernst v. Hudson River Railroad*, 35 *N. Y. Rep.* 9, and cases there cited.) 6. The court charged that a man approaching a railroad in plain sight, is bound to look and listen, &c. and if he does not he cannot recover.

IV. The court properly refused to charge the jury "that if the bell was rung as the defendants' engineer and fireman swear it was, the plaintiff cannot recover," and the exception to said refusal was not well taken. 1. The court had fully and distinctly charged that "if they were running upon their ordinary speed and rung the bell continuously for this whole distance, (80 rods,) you must say that they were guilty of no negligence, and you would be bound to find a verdict in favor of the defendants." 2. Again, the court charged that "If they were running at the ordinary rate of speed, and gave the signals prescribed by law, they were not guilty of any wrongful act or of any negligence." The engineer and fireman testified that they were going at ordinary speed, and that the bell was rung continuously eighty rods, &c. 3. Therefore, the court having already charged in accordance with the counsel's request, very properly refused to again repeat the charge. (35 *N. Y. Rep.* 82.) 4. The question of the defendants' negligence and consequent liability did not

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alone depend upon the want of signals, but was to be arrived at by all the acts of the defendants and all the circumstances of the case; all of which the jury were to consider in making up their verdict, and the court had no right in justice to the plaintiffs to limit them to the single question of whether the bell was rung or not.

V. The further request of the defendants' counsel to charge: "That if the plaintiff can recover, the damages, under the proof, can only be nominal," was properly disposed of by the court, and the exception thereto was not well taken. 1. The evidence showed that the deceased left a widow and five children for whom he provided. 2. No proof of damages resulting to the plaintiff or next of kin is necessary to sustain an action brought under the statute by the administrators of the deceased for injuries to the person. (14 *N. Y. Rep.* 310. 22 *id.* 355. 29 *Barb.* 234. 32 *id.* 25.) 3. The statute provides for the damages, and how they shall be given, as well as limits the amounts. (*Gen. Stat. vol. 4 part 2, chap. 10, § 2.*)

VI. The written request of the defendants' counsel to the court, to charge: "That it matters not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by," was properly disposed of by the court, and the exception thereto by the defendants' counsel was not well taken. 1. The evidence raised no question as to whether the bell was rung a part of the distance required by the statute or not. The plaintiffs' witnesses testified that the bell was not rung at all within eighty rods of the crossing. On the other hand, all of the defendants' witnesses, who testified upon that point, say that the bell rung continuously the whole distance of eighty rods before they reached the crossing. 2. The statute defines the duty of the defendants in this respect, and the court properly charged not only in accordance with that law, but also in accordance with the evidence presented in the case. 3. The court had already charged

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the substance of that request. 4. The statute having fixed and prescribed the duty of the defendant, the court had no right to ignore it and prescribe in this particular case a different rule, or lessen that duty. 5. If the defendants run their train in violation of a plain provision of the statute, they should not ask the court to disregard the law to shield them from the consequences of their omission or neglect. 6. The legislature deemed it necessary for the safety of the wayfarer for the bell to be rung continuously at least eighty rods, and so fixed the duty.

H. Gray, for the defendants. I. The court erred in refusing to charge the jury that if the deceased might, at any point within ten rods of the crossing, have easily seen the approaching train nearly a mile off, he was bound to survey the space, or in other words, look up the road; and if by omitting to do so he lost his life, the plaintiffs could not recover. If the charge of the judge had been left, as it obviously would have been had not the plaintiffs' counsel made a request with which he complied, no ground of complaint would have existed against that portion of it pertaining to the plaintiffs' duty to look for the approaching train; but as it is, his refusal to charge as requested by the defendants' counsel, interpreted by the light of what he had previously charged at the request of the plaintiffs' counsel, amounts to this: That although the statement of Gorton, that he turned half way round and looked up the track after he had passed five or six rods from the persons he met, was, as the defendant insisted, untrue; nevertheless, if at the place specified by him, or at any place in that vicinity, his omission to look at what he would have plainly seen, cost him his life, it did not, in judgment of law, establish his negligence, unless signals were given, is manifest error. (*Spencer v. The U. and S. Railroad*, 5 Barb. 337. *Brooks v. Buf. and N. F. Railroad*, 25 id. 600, 604. The question now under consideration was first

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considered in the Court of Appeals in *Steves v. The O. and S. Railroad*, (18 N. Y. Rep. 422.) There the injured party was traveling in plain sight of the approaching train, with his coat turned up around his ears, with abundant opportunity to see and avoid it, if he would but look. Some evidence was given tending to prove that the bell was not rung. Three of the judges, Denio, Selden and Pratt, were of the opinion, "That the object of the statute, requiring the ringing of the bell or the sounding of the whistle, was to put persons negligently approaching crossings on their guard; and that the question whether the negligence of the plaintiff was such that if the proper signals had been given, he would still have been injured, was one which should have been submitted to the jury." But in this they were overruled; the majority of the court holding that omitting to ring the bell or sound the whistle, rendered the defendant liable to the penalty prescribed by law, and that notwithstanding it may not have been rung, a failure to exercise the sense of sight, which would surely have avoided the catastrophe, was legal negligence. It is submitted, therefore, that the issue presented by the dissenting judges, and decided by the court, is decisive of the question now under consideration. It has not only not been overruled, but the principle established by it has been affirmed in subsequent cases. (*Wilds v. The Hudson River Railroad*, 24 N. Y. Rep. 430. *Same v. Same*, 29 id. 315, 327, 328.) A struggle has, nevertheless, been going on in the Court of Appeals since Judge Porter, who was counsel for the plaintiff in the cases of *Steves v. The Utica and Schenectady Railroad*, (18 N. Y. Rep. 422,) and *Wilds v. The Hudson River Railroad*, (29 id. 327,) became a judge of that court, in which efforts have been made to disturb the principle supposed to be settled by the cases referred to. In *Beisiegel v. The New York Central Railroad*, (34 N. Y. Rep. 622,) Judge Porter, at page 633, held that: "The omission of the customary signals was an assurance by the

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company to the plaintiff, that no engine was approaching within a quarter of a mile, on either side of the crossing; he was not bound to look out for danger, when assured by the company that the crossing was safe." But in the same case, at page 625, Judge Morgan held that: "If the track had been clear, so that the plaintiff could have seen the approaching train, then, doubtless, it would be negligence in him not to have seen it. So much must be conceded as settled by the adjudications in this state." In *Ernst v. Hudson River Railroad*, subsequently reported, (35 N. Y. Rep. 9,) Judge Porter had held the same views expressed by him in Besiegel's case, but Judge Hunt, at page 47, held that Ernst, as far as he could see the railroad, "was bound to survey the distance," intending, as he said, to observe the principles laid down in *Wilds* and *Stevens*," theretofore cited. Thus it will be seen that the opinion expressed by Judge Porter was, as he said, (p. 36,) referring, doubtless, to the opinion of Judge Denio in the *Wilds*' case, but "the *dictum* of an accomplished and able jurist," which has not attained the strength of authority. The same case was afterwards before the Court of Appeals, (32 How. Pr. 64,) and Judge Woodruff, who delivered what seems to be the prevailing opinion in the case, held that "a traveler in approaching a railroad, is bound to use his eyes and his ears, so far as there is opportunity, and that negligence in giving signals, or in omitting precautions of any kind, will not excuse his omission to be diligent in such use of his own means of avoiding danger." This, it seems, ought to quiet all doubts upon a question that was supposed to be settled from the time it first arose in this state until Besiegel's case came before the court; and in that case the opinion of the learned judge, so far as it bears upon the question now under consideration, was, in the opinion of his associates, regarded a mere *obiter*.

II. The judge erred in refusing to charge the jury "that

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it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by.

III. The warning of the judge "not to overlook the fact, that men commonly pay some attention to their own safety; to their own lives; and that there was nothing in the case to show that these men intended to commit suicide; or that Gorton intended to have Havens killed," as well as the expression in allusion to Gorton and Havens, "they cannot look both ways at once," was, under the circumstances, uncalled for and calculated to mislead the jury. It is believed not to be within the experience of any judge, that a railroad corporation in case of collision of vehicles, ever in an even case, had the verdict of a jury in its favor; and where the case is as two to one and even much stronger in favor of such a corporation, no case occurs to the defendants' counsel, of a verdict in favor of the corporation, unless the judge presiding was careful in balancing the scales of justice, so far as he was able to cast out of the one side the sympathy and prejudice that inclined the scale against the corporation. So apparent and weighty is the influence against such a corporation, and the sympathy in favor of an individual, that judges of large experience and ability have assigned it as a reason for taking cases, unless entirely clear, from the consideration of a jury. (*Haring v. N. Y. and Erie R. R.* 13 Barb. 9, 16. *Suydam v. The Grand street and Newton R. R. Co.*, 17 Abb. 304.) "Every person who has had any experience in courts of justice knows very well that a case of this sort against a railroad company could only be submitted to a jury with one result," say the court in *Toomey v. The London, Brighton and South Coast Railway Company*, (91 Eng. Com. Law, 146.) The warning given by the judge, "not to overlook the fact that there was nothing to show that these men intended to commit suicide, or that Gorton intended to have Havens killed," was, in any aspect of the

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case a strong intimation against the defense, without any similar remark or intimation against the plaintiffs to balance it; and the remark that Gorton and Havens could not look both ways at once was uncalled for. There is nothing in the case that will justify the inference that a contrary view was urged at the trial. The learned judge was the "unbiased adviser of superior knowledge and experience, and consequently entitled to great credit;" and hence the defendants complain of what is deemed an intimation by the court prejudicial to their rights, thrown into the scale already borne down by "compassion," sympathy, and perhaps prejudice against a gigantic corporation, and for nothing bearing upon the merits of the case.

By the Court, E. DARWIN SMITH J. This case comes here upon exceptions taken at the circuit and ordered to be heard at the general term in the first instance. It is, therefore, presented to us as a pure bill of exceptions, and we can only review the legal decisions made at the circuit, and those only so far as they were duly excepted to. The first exception taken upon the argument was taken to the refusal of the judge to charge as requested in these words: "That if the deceased might, at any point within ten rods of the crossing, have easily seen the approaching train, nearly a mile off, he was bound to survey the space, or in other words to look up the road, and if, by omitting so to do, he lost his life, the plaintiffs cannot recover." I do not see why the request did not, in substance, ask the judge to state the law correctly upon the point presented. But it seems to me that it virtually did nothing more than ask the judge to repeat what he had already, in substance, said to the jury. He had just said, in his charge to the jury, "That if you shall say upon the evidence that, after going within eight, ten or twelve rods, they looked up and saw no train and heard none, you are to say whether it be ordinary prudence for them to go on the track, looking down

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the road for a train coming in that direction. Was the company in fault in the first instance, and if so were these men without fault? Did they look and did they listen to see if the train was coming? Men approaching a railroad in plain sight are bound to look and see if any train is coming. If they look up and down the road, as men of ordinary prudence would do in traveling near a railroad, and were not negligent, the plaintiffs are entitled to recover if the persons in charge of the railroad were negligent." This part of the charge states the rule in respect to the conduct of a plaintiff in such cases correctly, and covers substantially the very proposition presented in the request to charge. It is not the duty of a judge at the circuit, in response to requests, to go over again the very ground or questions covered by the charge as given; and it is not the right of counsel when the charge is ended to seek to get a repetition of a leading idea already fairly expressed, by a request to charge upon it anew, or in some little different phraseology, so as to get in that shape a virtual re-argument of the facts before the jury. The charge fairly stated the duty of a person approaching a railroad crossing to look up and down the road as men of ordinary prudence would do, in traveling near a railroad. It is not a question of law how far a man should look, but he must use his eyes and his ears, in view of the circumstances, as men of ordinary prudence would do in like cases. And this rule is one for the jury to apply, and it is not the duty of a circuit judge to refine upon a proposition of law, once fairly stated, and divide it and subdivide it to meet every varying view of the facts which may be taken by counsel. I do not think, if the judge had responded to this request as asked, he would, in effect, have stated any new, different or other principle of law than such as he had already well stated to the jury on the subject. This exception, therefore, I think, is not well taken. The same view applies to the next exception. The judge was asked

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to charge, "That if the bell was rung, as the defendants' engineer and fireman swear it was, the plaintiff cannot recover." The judge had, in substance, so charged. The judge had expressly said to the jury that if the train was running upon its ordinary time, if the engineer and fireman gave the signals required by law, they were not guilty of any wrongful act or negligence. The same remark in regard to the signals was repeated in different forms several times, in the course of the charge, and there was and could be no ground for mistake on this point. It was quite unnecessary for the judge to repeat his charge on this point, in response to this request. It was not error to refuse to charge that "it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by. The legislature has said that this "far enough to warn passers by" shall be eighty rods. The jury had no right to change the rule as thus fixed. It was the duty of the defendants to ring such bell continuously for the distance of eighty rods, as stated by the judge.

These are all the exceptions taken or particularly urged upon our attention. No error, I think, was committed at the circuit, and the motion for a new trial should be denied.

New trial denied.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson, and J. C. Smith*, Justices.]

PERKINS *vs.* GILES and TRACY.

Where it is obvious from the complaint and the papers referred to and made a part thereof, in an action to set aside an award and for other relief, that the plaintiff has no cause of action, and no title to any portion of the relief demanded, unless he can succeed in getting rid of the award; and it appears plainly that the complaint does not state a case for setting aside the award, the court may properly refuse to hear the evidence offered and order the complaint to be dismissed. It is not bound, and cannot be required, to try mere barren issues, which can be productive of no fruit, in the end; and no exception will lie, for a refusal to hear evidence upon, or to try such issues. An award cannot be impeached except for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the facts. On these grounds courts of equity interfere to set aside awards, upon the same principles and for the same reasons which justify their interference in regard to other matters, where there is no adequate remedy at law. Nothing short of this will answer as a ground of interference, to set aside the determination of these tribunals.

Corruption, partiality, or gross misbehavior are all charges of a personal nature against the arbitrator, and relate only to his corrupt intentions, or unfair and improper conduct in the trial and determination of the matter before him.

An allegation, in a complaint, that an award "is partial and unjust" in certain particulars specified, is no charge that the arbitrator was guilty of any intentional partiality or injustice in making it; nor does it imply, even, any such imputation upon the arbitrator.

The merits of an award cannot be re-investigated, and where there is no charge of corruption or misconduct in the arbitrators, nothing *dehors* the award can be pleaded or given in evidence to invalidate it, however unreasonable or unjust it may be.

Where no mistake of fact, in an award, was alleged in the complaint, nor was it averred, in terms, that the arbitrator had made a palpable mistake in any matter of law; but it was averred that "said award is contrary to the lawful rights of the parties in real estate," specifying the error to be in a certain holding of the arbitrator; *Held* that this was rather in the nature of an objection and exception to an erroneous ruling or judgment in a matter of legal construction, than an allegation of a palpable mistake in such matter.

Mere *uncertainty*, in an award, forms no proper ground for the interference of a court of equity, to set it aside. If it is so uncertain that it cannot be executed, or enforced at law, it is void, and no resort to a court of equity is necessary, either for prevention or relief.

A PPEAL from a judgment entered at a special term, dismissing the complaint.

The plaintiff is the owner of a saw mill, and the defend-

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ants own a grist mill. Both are supplied with water from the same pond and through the same race. The plaintiff's saw mill is located upon the race *above* the defendants' grist mill; hence, all the water used by the defendants must pass the plaintiff's saw mill. Both mills, and the whole of the water power, were originally owned by the same individual, Ezra Cuykendall. On the 14th of October, 1839, Cuykendall conveyed the grist mill to Mosher. That deed contained the following clause: "The said parties of the first part always reserving to themselves, their heirs and assigns, the surplus water over and above what shall be necessary for the propelling two run of stone and other necessary machinery in the grist mill." Also, the following clause: "Also, the party of the second part, his heirs and assigns, to *have the privilege* of using, maintaining, and keeping in repair all that part of the raceway leading from the above described premises to the mill dam, and *the privilege* of using, maintaining, and keeping in repair the said mill dam, and raising the said mill dam so high as shall be necessary, and to flow water on the lands above said mill dam, so much as is contained in a grant made by Wilhelmus Cuykendall to the said Ezra Cuykendall, bearing date the 7th day of June, 1833." Also the following: "The said party of the second part to keep always, and at all times hereafter, the aforesaid dam and raceway in good repair, and of sufficient height to secure the water as high as it has heretofore been usually kept, inevitable accidents excepted." The defendants hold the Mosher title. Previous to August 14, 1866, disputes had arisen between these parties in regard to the use of the said water power by the respective parties, each claiming that the other had so used said water power as to deprive the other of the use of his proportion thereof, and to the injury of the other. Also in regard to the duties of the respective parties in keeping the dam and raceway in repair, and in keeping the raceway of suf-

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ficient capacity to allow sufficient water to flow therein for the use of both parties, and also in regard to the matters relating to said water power and to the use and enjoyment thereof. In order to settle *all of said disputes*, and to ascertain, determine, and settle upon the rights and duties of the several parties, and as between and towards each other, in regard to said water power, and the keeping in repair, *cleaning out, and, if necessary, enlarging the capacity of said raceway*, and in regard to all matters in any wise relating to said water power and said dam, and said raceway, as well as to what has heretofore taken place, as to what now is, and as to what shall hereafter be, the rights, privileges, and duties of the parties in regard thereto, the matter was submitted to Robert Howland, as sole arbitrator, who, among other things, was required to pass upon "the duties of the respective parties in regard to the further use of the said water power; the keeping in repair of said dam and said raceway; of enlarging said raceway, if necessary, and by whom the same shall be done." And in regard to every other matter or thing submitted, and to determine what costs and expenses of the proceedings, if any, should be paid by either party to the other. The said arbitrator proceeded to examine and view the premises, and to hear the testimony of the parties and of many other witnesses, and upon several sittings heard *all the proofs and* testimony, and after the whole had been submitted to him, and he had examined the said premises and seen the stream, the dam, reservoirs, raceway, and mills of both parties, and the condition and situation thereof, on or about the 1st day of February, 1867, he duly made and published his award and delivered a copy thereof to each of the parties.

This action is brought to set aside and vacate that award.

The material facts are stated in the opinion of the court.

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Cox & Avery, for the appellant.

D. Wright, for the respondents.

By the Court, JOHNSON, J. The action was brought to set aside an award, made by an arbitrator chosen by the parties, on matters submitted to him by them, by written submission, and for other relief after such award should be vacated and set aside. The action was brought on for trial at a special term, by the plaintiff, who offered to prove the several matters alleged in his complaint. Objection being made to such proof, on the part of the defendants, and a motion for dismissal of the complaint, the court refused to hear the evidence, and dismissed the complaint, on the ground that no equitable cause of action was set forth in such complaint. The plaintiff's counsel excepted, and brings his appeal from the judgment of dismissal. The defendants had answered the complaint, and denied all the principal allegations therein, upon which the right of action was sought to be predicated.

It is perfectly obvious from the allegations in the complaint, and the papers referred to, and attached and made part of the complaint, that the plaintiff has no cause of action whatever, and no title to any portion of the relief demanded, unless he can succeed in getting rid of the award. As long as the award stands, it is conclusive between the parties, upon all the subjects mentioned and set forth in the complaint, as grounds or causes of action. If, therefore, it can be seen plainly that the complaint, taken together in all its parts, does not state a case for setting aside the award, the court properly refused to hear the evidence offered, and ordered the complaint to be dismissed. It was not bound, and could not be required, to try mere barren issues, which could be productive of no fruit in the end; and no exception will lie, for a refusal to hear evidence upon, or to try such issues.

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The grounds upon which an action in a court of equity to set aside an award may be maintained, are, fraud, mistake or accident. (*Story's Eq.* § 1451.) Or, as the rule is perhaps better stated by Chancellor Kent in *Woods v. Monell*, (1 *John. Ch.* 101,) "An award cannot be impeached but for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the fact." On these grounds, courts of equity interfere to set aside awards upon the same principles and for the same reasons which justify their interference in regard to other matters where there is no adequate remedy at law. Nothing short of this will answer as a ground of interference, to set aside the determination of these tribunals of the parties' own selection.

Corruption, partiality or gross misbehavior, are all charges of a personal nature against the arbitrator, and relate only to his corrupt intentions, or unfair and improper conduct in the trial and determination of the matter before him. It is apparent upon the face of the complaint, that nothing of this kind is alleged against the arbitrator, who heard and determined the matters in difference between the parties in this case.

It is alleged in the complaint, as one of the grounds for setting aside the award, that it "is partial and unjust," in certain particulars specified. But that is no charge that the arbitrator was guilty of any intentional partiality or injustice in making it. Nor does it imply, even, any such imputation upon the arbitrator. The award may be partial and unjust in its operation against a party, where the arbitrator has been actuated by the most honest and sincere intentions and convictions. The merits of an award cannot be re-investigated, and where there is no charge of corruption or misconduct in the arbitrators, nothing *dehors* the award can be pleaded or given in evidence to invalidate it, however unreasonable or unjust it may be. (*Todd v. Barlow*, 2 *John. Ch.* 551.)

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The other ground for setting aside an award is a palpable mistake made by the arbitrator, either of fact or of law. No mistake of fact is alleged, nor is it averred in terms that the arbitrator has made a palpable mistake in any matter of law. It does aver, however, that "said award is contrary to the lawful rights of the parties, in real estate," and specifies the error to be, that "it holds the gradual filling up of said dam, &c. as aforesaid, one of the inevitable accidents provided for in the deeds, and which constitutes an exception to the defendant's duty and obligation thereby imposed." This, it will be seen, is rather in the nature of an objection and exception to an erroneous ruling or judgment in a matter of legal construction than an allegation of a palpable mistake in such matter. I should be inclined to hold it sufficient, however, as an allegation, if the matter to which it refers fell within the rule and constituted a palpable mistake in regard to a matter of law. It does not follow at all, necessarily, that it was a palpable mistake in matter of law, even though we might hold it to be an erroneous ruling in such a matter.

But looking at the submission of the matters in controversy by the parties to the arbitrator, and his award, which are referred to and made part of the complaint, it will be seen that the subject of the filling up of the mill pond and raceway, and whose duty it was to clear them out and keep them in that condition, and what were the duties and obligations of the parties respectively in relation thereto, and toward each other, were each and all submitted to the arbitrator to be passed upon and determined by him. This he has done, covering the entire ground of litigation and controversy between the parties, and were we at liberty to review the determination of the arbitrator, as we do questions of law, upon exceptions, in actions, it is quite doubtful, at best, whether we could hold that the arbitrator was in error in the particular of legal construction

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complained of. It is certain there has been no glaring or palpable mistake, in any matter of law. If wrong at all, which I do not admit, it is but an error of judgment upon the very point in controversy, which is not entirely clear in the plaintiff's favor. And this is no ground for interfering, according to all the authorities.

The obligation of the defendants, and those under whom they claimed, and derived title, by their deeds, was "to keep always, and at all times hereafter, the aforesaid dam and raceway in good repair and of sufficient height to secure the water as high as it has heretofore been usually kept." According to the allegations in the complaint, the pond formed by the dam and the raceway had become gradually filled with mud and silt to such an extent that they would not hold the same quantity of water which they did formerly, and had become of little or no use, comparatively, as reservoirs of water, for the purpose of operating said mills and machinery. The point in controversy was, whether it was not the duty of the defendants, at their own cost and charge, to excavate and remove this mud, &c. thus accumulated, according to the terms and conditions of the grant under which they held.

The arbitrator, upon all the facts before him, held and determined that the filling of the pond and raceway with sediment did not enter into the minds of the parties to the original grant, and that the excavation and removal by the grantees, of such sediment, was not within the contemplation of such parties. He construed the language of the deed as applying only to the embankment or structure forming the dam, and the banks of the raceway, "including all breastwork, timber, boards, gates and barriers, that are required to regulate the stream at the dam." The accumulation of sediment he considered to be one of those "inevitable accidents" referred to in the deed as an exception to the obligations of the defendants. This bottoming out the mill pond, created by the dam,

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might well, as it seems to me, be regarded as a different undertaking from that of keeping the dam in good repair. It is not within the terms of the deed, and after the most careful consideration I am not at all clear that the arbitrator was not entirely right in his determination.

Another ground alleged in the complaint is that the award is uncertain. I do not think mere uncertainty in an award forms any proper ground for the interference of a court of equity to set it aside. If it is so uncertain that it cannot be executed, or enforced at law, it is void, and no resort to a court of equity is necessary either for prevention or relief. But however this may be, the award here is not uncertain. It is as definite and certain as in the nature of things it could be made. Both the duty and the obligation of each party are distinctly specified and determined. If it is sufficiently certain to uphold a contract on the same subject, the award is good. (*Ackley v. Ackley*, 16 *Verm. R.* 450.) No one, I think, can doubt that a contract between the parties, like this award, on the subject complained of, would be sufficiently certain to create a valid obligation.

On the whole, it appears to me very clear that no grounds for impeaching and setting aside an award in a court of equity, are alleged or set forth in the complaint, and that the judge, at special term, was right in dismissing the complaint and refusing to entertain the case on the immaterial issues presented by the pleadings. The judgment, therefore, must be affirmed, with costs.

[MONROE GENERAL TERM, March 1, 1869. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

Cope v. Alden.

JOHN COPE, Jr. adm'r of JOHN McCRAVEY, and ELIZABETH
P. McCRAVEY vs. JULIUS T. ALDEN.

An agreement for the loan of money, made and consummated in this state by residents thereof, by which the borrower is to give a bond accompanied by a mortgage upon lands in Wisconsin, no place of payment being specified, is governed by the usury laws of New York and not by those of Wisconsin.

THIS case comes up for a second review, (*see* 46 *Barb.* 272,) on a motion by the plaintiffs for a new trial on exceptions ordered to be heard in the first instance at general term.

The action was brought to recover surplus moneys on a statutory foreclosure of a mortgage given by the plaintiffs to the defendant on the 31st day of January, 1860, on premises in Oneonta, N. Y. for \$800. The sale took place on the 10th day of May, 1862, when the premises were bid off by the defendant for \$2300, leaving a surplus of \$1379.11. The defendant seeks to retain the moneys by virtue of a mortgage given by the plaintiffs to the defendant, July 5, 1861, on the same premises. The plaintiffs, by way of reply, claim that the latter mortgage was usurious because a portion of the consideration thereof was a bond and another mortgage given to the defendant by the plaintiff Elizabeth. That on and prior to the 22d day of November, 1858, all the parties were residents of Oneonta, in this state, where the plaintiff, Elizabeth, made an agreement with the defendant, by the terms of which he was to loan her \$900, for which she was to give him a bonus of \$100; that for the payment of the \$1000 she was to give him her bond for \$1000, and interest, and a mortgage upon certain lands in Grant county, Wisconsin. That the defendant, at Oneonta, paid her \$1000, when she gave him back \$100, and delivered him her bond and the mortgage agreed upon, neither of them specifying any place of payment.

It appeared on the trial that the legal rate of interest in

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Wisconsin, in the absence of a special agreement between the parties, is seven *per cent*, but that twelve *per cent* may be reserved by special agreement. That where more than twelve *per cent* is reserved, the excess over twelve *per cent*, only, is forfeited, and the agreement is valid and may be enforced for the principal and all interest not exceeding twelve *per cent*.

The court directed a verdict for the defendant, on the ground that the contract was governed by the laws of Wisconsin and was not usurious.

N. C. Moak, for the plaintiffs.

Sturges & Countryman, for the defendant.

By the Court, MASON, J. The only important question in this case is whether the bond and mortgage, executed by the plaintiff, Elizabeth McCraney, to the defendant, on the 22d day of November, 1858, for \$1000, was usurious or not. At the time of the execution of the said bond and mortgage both Mrs. McCraney and the defendant resided at Oneonta, in the county of Otsego, in this state, where both the agreements to loan the money were made, the bond and mortgage were executed and delivered, and the money was paid thereon. The mortgage was upon lands in Grant county, in the state of Wisconsin; neither the bond nor the mortgage designated any place of payment. The agreement between the parties was, at the time, that the plaintiff, Mrs. McCraney, should give to the defendant a bond and a mortgage on these lands in Wisconsin for \$1000; that the defendant should advance to her \$900, and the \$100 should be given as a bonus for the loan, which was done accordingly. The question presented for our decision is whether this is a contract to be governed by the laws of the state of New York or those of Wisconsin, and I entertain no doubt but that it must

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be regarded as a New York contract, where the *lex loci contractus* controls. Every concomitant to make it a New York contract seems to exist in the case. The parties reside here; the loan was made here; the securities were executed here; the money is certainly payable here, where the parties reside. Upon such a state of facts I am not able to discover any principle of law upon which this can be pronounced a Wisconsin contract; and no adjudged case has been referred to upon the argument, nor have I been able to find any which would hold it such. On the contrary, the very reverse was held by the Supreme Court of the United States in the case of *De Wolf v. Johnson*, (10 *Wheat.* 383,) where it is expressly decided that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another state. The case is cited with approbation in the case of *Anderson v. Pond*, (13 *Peters*, 78.) The case of *Newman v. Kerson*, (10 *Wis. R.* 333,) is directly in point, and decides the very question presented in this case. The suit was brought in that case to foreclose a mortgage in Wisconsin; the parties both resided in New York where the loan was made, and the bond and mortgage was executed on lands in Wisconsin, and Chief Justice Dixon, in giving the opinion of the court, says: "We have no doubt that this contract is to be governed by the laws of New York." (*See page 340.*) He adds: "In this case the parties all resided in New York; the loan was made there; was to be repaid there; and the laws of that state must govern the contract as to its validity and effect." (*See page 344.*)

The principle of these cases is affirmed by Chancellor Kent in his *Commentaries*. - (3 *Kent's Com.* 460, 3d ed.) He says: "The general doctrine is that the law of the place where the contract is made is to determine the rate of interest where the contract gives, specifically, interest, and this will be the case though the loan be secured by a mortgage

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on lands in another state, unless there are circumstances to show that the parties had in view the laws of the latter state in respect to interest." And judge Story affirms the rule to be the same. He says: "Whether a contract is usurious or not depends not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract was to be made and is to be executed." (*Story's Conflict of Laws*, § 292, 5th ed.) And he adds: "In cases of this sort it will make no difference that the due performance of the contract is secured on other security, situated in another country where the interest is lower." (§ 293.) In section 287 he declares the rule to be that where a loan is made in one state and security is to be given therefor in another state by way of mortgage, the law of the place where the loan is made is to govern; for the taking of a foreign security does not necessarily alter the locality of the contract. Taking security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is given.

The legal fulfillment of a contract of loan on the part of the bondsman is the re-payment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract, (*Story's Conflict of Laws*, § 287,) which is a mere reiteration of what was said by the court in *De Wolf v. Johnson*, (10 *Wheat.* 387.)

This doctrine has never been overruled in any case which I have been able to find. The case of *Chapman v. Robertson*, (6 *Paige*, 627,) is relied on by the defendant in this case, but in that case the contract was made between a citizen in this state and a British subject in England. The bond and mortgage were executed by Robertson here, recorded here, and forwarded to Chapman in England,

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who advanced the money upon them by depositing the same with Robertson's banker for his use. The Chancellor holds that as the payee resided in England at the time of the making of the contract, the bond and mortgage naming no place of payment, the legal construction of the contract is that the money must be paid where the obligee resides, &c. Whatever may be thought of this case—and its soundness has been questioned by Chancellor Kent in his Commentaries and by Judge Story—it decides nothing in the case before us. It is evident from the opinion of Chancellor Walworth, in the case, that he excepts this case, and indeed seems to hold this contract usurious. After citing *Stapleton v. Conway*, (3 Atk. 727,) where Lord Hardwick held that a mortgage upon land in the colonies, if executed in England, and connected with a bond or other personal covenant for the payment of more than five *per cent* interest, was usurious and void, &c. Chancellor Walworth says, on page 632, "Doubts will exist as to the validity of laws made in England upon such securities where both parties resided there, especially if the money was not loaned for the purpose of being used in the colony where the mortgaged premises were situated, as the giving of such a security might be a very convenient mode of evading the statute of usury."

This meets the very case before us. The case of *Balme v. Wombough*, 38 Barb. 352,) relied upon by the defendant's counsel, decides nothing in the case at bar. All that case decides is that promissory notes made and dated in Minnesota, for money there loaned and advanced, payable at a bank in the state of New York, with interest at twenty-five and a half per cent per annum, and secured by mortgage on land in Minnesota, will not be declared void by the courts of this state, or directed to be surrendered and canceled. The case holds just what has been decided in a good many other cases, that the general rule that the validity of the contract is to be decided by the laws of the

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place where the contract is to be performed does not apply to cases involving the rate of interest, where it is stipulated in the contract at the place where the loan is made in conformity with the law of the place, that a higher rate of interest shall be paid than is allowed by the place of performance, but that the *lex loci contractus* governs. (1 *Paige*, 220. 20 *Martin's Lou. R.* 1. 6 *Paige* 627. 7 *id.* 632. 22 *Barb.* 121. 20 *Eng. Law and Eq.* 555. 2 *Kent's Com.* 460. 2 *Pars. on Cont.* 95; also *n. E.*) And it is this class of cases upon which the defendant's counsel seems mainly to rely in this case. It is not necessary to consider the soundness of the rule laid down in these cases, as they decide no principle involved in the case under consideration; but as I understand the case of *Lee v. Selleck*, 33 *N. Y. Rep.* 615,) the Court of Appeals there decides that the liability of a maker on a promissory note executed in New York and payable in Illinois is controlled by the laws of Illinois, the state in which his engagement is to be performed; and whether that court will allow the symmetry of the law to be marred by making the question of usury in a case like the present an exception to this certainly general rule remains to be seen.

The doctrine laid down in 9 *Allen*, 78, and many other cases, holding that the laws of the state where the lands are situated, must control as to the form of the mortgage or deed, its manner of execution and acknowledgment, &c. have nothing to do with the question in this case. It is true that in all these respects the law of the state where the lands are situated must control; but that does not touch the question of usury in the case.

It is said that this contract was entered into by these parties upon the understanding and with the intent to bring it under the laws of Wisconsin and not those of New York. I have sought in vain for any evidence of this, in the case. They make the contract here, in this state; the

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parties reside here; the money is advanced here; the bond and mortgage were executed and delivered here; the payment was to be made here; and the whole thing was done and to be done under the laws of this state, excepting the mortgage as a security for the loan was upon lands in Wisconsin, and had, of course, to be recorded there. As a general proposition it cannot be denied that contracts, as to their validity, are to be tested by the laws of the state where they are made, and are to be executed; and it was held in the case of *Jewell v. Wright*, 30 N. Y. Rep. 259,) that where a note made and dated in this state and payable at a bank here was negotiated in another state, the laws of New York are to control as to the defense of usury. This is upon the ground that the law regards the contract as coming under, and consequently governed by the law of the state.

In the case at bar it seems to me very clear that the court should have held this bond and mortgage controlled by the laws of this state, and consequently usurious, without submitting any fact to the jury. And in any view which can be taken of the case upon the facts, it is certainly usurious if made to avoid the usury laws of this state. (*Chapman v. Robertson*, 6 Paige, 632.) If there was any doubt upon this subject it should have been submitted to the jury to determine, but I do not think the case upon the undisputed facts, can be brought under the laws of Wisconsin, but must be held to be a New York contract.

As the \$1000 mortgage went into and formed a part of the consideration of the \$1669 mortgage, the latter is also usurious, as is held in all the cases, (*Price v. The Lyons Bank*, 33 N. Y. Rep. 55; *Jacks v. Nichols*, 1 Seld. 178; 35 Barb. 96; 20 John. 285; 6 Cowen, 647; 21 Wend. 103;) and the mortgage is void as to the whole. (17 Barb. 397. 21 id. 361.)

If I am right in the views above expressed, it follows

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that the defendant cannot hold these surplus moneys on this mortgage, for the same, being usurious, gave him no valid lien upon the premises. A new trial must be granted, costs to abide the event of the action.

[BROOME GENERAL TERM, July 9, 1867. *Mass, Balcan and Boardman* Justices.]

WATSON vs. SHUTTLEWORTH and others.

One who indorses commercial paper before maturity, for the accommodation of the payees, without any knowledge of the fact that the note was executed by the makers for the benefit of the payees, upon the faith of a promise by the latter to send the makers paper sufficient to pay the same, and that such promise has been only partially performed, may, after having been compelled to pay the note, recover the amount of the makers.

A recovery in such an action will not be defeated by the fact that the makers have executed to the plaintiff a voluntary assignment of their property in trust for their creditors, in which the plaintiff is named as a preferred creditor; where it appears that no dividend has been made under such assignment, nor any application made of money realized from the assigned property, upon the plaintiff's claim.

The mere acceptance of such a trust, by the assignee, will not have the effect to suspend his remedy as indorser, against the makers.

The parties to commercial paper are liable in the order in which their names appear upon the same. Hence if a second indorser is compelled to pay the amount, he may recover the same in an action against the makers.

THIS is an appeal by the defendants from a judgment rendered upon the report of a referee, in favor of the plaintiff, for \$586.41, on the 10th day of July, 1866. The facts appear in the following opinion:

N. C. Moak, for the appellants.

N. P. Hinman, for the respondent.

Watson v. Shuttleworth.

By the Court, INGALLS, J. On the first day of May, 1862, the defendants executed a promissory note of which the following is a copy :

“\$300.

New York, May 1, 1866.

Three months after date, we promise to pay to the order of Messrs. R. D. & J. W. Chase, three hundred dollars, at the Park Bank. Value received.

SHUTTLEWORTH & Co.”

The note was delivered to the payees, who indorsed the same, and subsequently the plaintiff in this action indorsed the same, and the note was discounted for the benefit of the Chases, the payees therein named, by Charles Goodyear, banker, at the Schoharie County Bank. The note not being paid at maturity, was protested for non-payment, and an action was commenced by Goodyear to collect the same, and a judgment was obtained against said Watson, the plaintiff in this action, who was compelled to pay the same. The present action was instituted by Watson to recover of the defendants, who were the makers of the note, the money so paid by the plaintiff as such indorser. It appears that the defendants were induced to execute the note for the benefit of the payees, under a promise from them that they would send to the makers, paper, in May, June and July, 1862, sufficient to pay the said note, and in the month of June paper of the value of \$136.20 was sent to and received by the said Shuttleworth & Co. but no more was received. On the 14th June, 1862, the Chases made a voluntary assignment for the benefit of their creditors to Watson, the plaintiff in this action, who was therein named as a preferred creditor. At the time this action was tried, no dividend had been made under the assignment, nor had there been any application made of money, realized from the assigned property, upon the indebtedness in question. The referee finds that the plaintiff was an accommodation

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indorser and received no consideration for such indorsement, and that at the time he so indorsed the said note, he had no knowledge of the special agreement between the defendants and the Chases in relation to the consideration for which the note was made. Upon this state of facts we are of opinion that the referee decided correctly in holding that the plaintiff was entitled to recover of the defendants, as the makers of the note, the money which he was compelled to pay as such indorser. The note was commercial paper, indorsed by the plaintiff before its maturity, and without any knowledge of the arrangement between the makers and payees, and, as such indorser he was compelled to pay the same. We are unable to perceive upon what principle the parties to the paper should not be held liable in the order their names appear upon the same. This is a well established and recognized rule in regard to commercial paper, which should not be departed from, without a reason which is clear and controlling. The plaintiff had a right to assume that the makers of the note would be primarily liable, certainly as to himself, who was merely an indorser, without any compensation therefor, and that in case he was compelled to pay the same, he would have recourse to the defendants as such makers. (*Bradford v. Corey*, 5 Barb. 461. *Parsons' Mercantile Law*, p. 93. *Hoge v. Lansing*, 35 N. Y. Rep. 136. *Davis v. McCready*, 17 id. 230. *Car v. Lewis*, 20 id. 138.)

The execution of the assignment by the Chases to the plaintiff could not, in my judgment, have the effect to defeat the plaintiff's recovery. It did not amount to a payment or satisfaction of the plaintiff's cause of action for the money so paid by him. No portion of the avails of the assigned property had been applied upon the indebtedness, nor had it even been ascertained what amount would be realized to be thus applied. It is quite clear that the mere acceptance of the trust by the plaintiff did not have the effect to suspend the plaintiff's remedy against the defend-

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ants. The plaintiff was at liberty but not bound to wait until the assigned property was disposed of and converted into money, *before he at least obtained a judgment against the defendants.* It would be a harsh rule, indeed, to compel a party to desist from putting a claim in judgment against a third party, thereby creating a lien or security, simply because the owner of such claim had become an assignee and a preferred creditor under an assignment. A court of equity will, in some cases, interfere and direct in regard to the collection or enforcement of a judgment. I have examined the cases cited by the appellants' counsel, bearing upon this question, and am satisfied that they do not establish a defense to this action. The defendants have received, and so far as the facts disclose, retain \$136.20, the avails of the paper sent by the Chases expressly to apply upon the note in question. There was no fraud established on the part of the Chases, based upon their representations to the defendants, which could affect the rights of the plaintiff against the defendants.

We are satisfied that no error was committed by the referee which should reverse this judgment, and therefore conclude that the same should be affirmed, with costs.

[ALBANY GENERAL TERM, March 1, 1869. *Müller, Ingalls and Hogeboom*, Justices.]

WOODWORTH vs. BENNETT.

Although the sale of a bid for a contract upon public works is illegal and void, yet if the purchaser gives his note for the purchase money, for the benefit of several persons interested in the bid, and afterwards pays it to one of them, the latter cannot set up the illegality of such sale, to avoid the payment to one of the payees, of his share of the note.

Such a note cannot be enforced, as between the immediate parties to it. The maker can successfully resist the payment thereof; and the defense of the illegality of the transaction out of which the note arose would be a perfect defense to an action brought to collect it, *it seems*.

Money having been placed in the hands of an individual as a mere depositary, for the use of another, may be recovered by the latter, whether it was paid to the depositary on a legal or an illegal contract. The liability of the depositary arises upon the receipt of the money, and is entirely separate from, and independent of, any illegal contract.

THIS action was brought by the plaintiff to recover the value of a quantity of quarried stone, left by him upon the bank of the Erie canal, and taken from thence by the defendant. The plaintiff, in his complaint, alleged that on the 2d day of May, 1863, the defendant was indebted to the plaintiff in the sum of \$500, for a large quantity of stone, the property of the plaintiff, and taken by the defendant from the bank of the Erie canal, and converted to the use of the defendant upon a contract for constructing the enlarged Erie canal, and for which stone the defendant had received pay from the state of New York. The plaintiff waived the tort and claimed from the defendant what said stone were reasonably worth, or what the defendant received for them from the state of New York.

The defendant, by his answer, denied the complaint, and each and every allegation therein contained. For a second and further defense, he alleged that he purchased and bought of the plaintiff a certain lot of stone, being the same stone mentioned in the complaint, at the stipulated price of \$100; that the defendant had paid \$100, the price agreed upon for said stone, to the plaintiff, in full. For a third defense, the defendant alleged that the plaintiff was

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indebted to him in the sum of \$300, and interest thereon for six years, for money loaned and advanced to the plaintiff by the defendant at the plaintiff's request; also, for money had and received by the plaintiff and his agents of the defendant, at the plaintiff's request; also, for money paid, laid out, expended and advanced by the defendant to the plaintiff, his agents and servants, at the plaintiff's request, which said sum of \$300 and interest the defendant claimed a right to prove and offset against the plaintiff's claim, on the trial, and to have judgment for a balance of \$200, over and above the plaintiff's said claim, with the costs of this action. The defendant further alleged, that in or about the year 1857, the plaintiff, defendant, and one De Witt C. Stephens and Charles Truesdell held a note for the sum of \$400 and interest, against one Harroun, of Fulton, Oswego county; that the plaintiff collected the amount of said note and paid over the amount thereof going to said Stephens and Truesdell to said Stephens and Truesdell; that the balance of the proceeds of said note belonging to the plaintiff and defendant, was adjusted, and the sum of \$100 fixed and agreed upon as the sum going to the defendant, which said sum of \$100, with interest thereon from the year 1857, the plaintiff agreed to pay the defendant; but had not paid the same or any part thereof to the defendant, and is justly indebted to the defendant therefor, which said sum the defendant would prove and offset against the plaintiff's claim, and claim a judgment for a balance of \$150, over and above the plaintiff's claim in this action. The defendant further alleged that he and the plaintiff, in or about the year 1853, were in partnership in certain business transactions in this state; that after said partnership had terminated and been dissolved, and a settlement of all partnership matters between the plaintiff and defendant had been had, the defendant, at the request of the plaintiff, paid in the aggregate in different small sums, the

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sum of \$100 of the partnership debts of the plaintiff and defendant out of the defendant's individual funds, at the request of the plaintiff; that one half of the amount so paid by the defendant, the plaintiff, both before and after the same had been paid, agreed to repay and refund, with interest from the year 1853, or thereabouts, to the defendant; that the plaintiff had not refunded or repaid the same, or any part thereof, but was still justly indebted to the defendant therefor, which said sum, with the interest thereon, the defendant would prove on the trial and offset against the plaintiff's claim, and claim judgment for a balance of \$100, and interest since the year 1855.

The plaintiff put in a reply by which he denied each and every allegation of new matter in the answer contained. And for a further reply to the answer admitted that the plaintiff and defendant were copartners in certain business transactions, as stated in the defendant's answer, and alleged that after the work was completed and the money received from the state, the plaintiff and defendant settled between themselves and paid all copartnership debts, and that there remained on hand, as property of said copartnership, a derrick worth \$60, and other tools and fixtures worth \$300; that the defendant took said copartnership property and converted the same to his own use. And the plaintiff further alleged that he had a claim against one Wm. S. Parkhurst for \$50, which, by a formal assignment, he sold to the defendant, said defendant agreeing that he would pay afterward the plaintiff therefor; that the defendant has not paid the same, or any part thereof, nor for said copartnership property or any part thereof.

And, in reply to the fourth counter-claim set up in the defendant's answer, the plaintiff alleged that said note made by Harroun belonged solely to the plaintiff; that the defendant could claim no portion of said note without relying upon a copartnership agreement, made in contra-

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vention of the statutes of this state, illegal, contrary to public policy, and void, and that the transaction through which the defendant claims a part of the Harroun note, was contrary to law, against public policy, illegal and void. Wherefore said plaintiff claimed to set off one half of the value of said derrick, tools and fixtures, and the claim for \$50 against Parkhurst, sold to the defendant, against the claim of the defendant alleged in his said answer, and demanded judgment for \$500, the sum specified in his complaint, besides costs.

The action having been duly brought to trial before a justice of this court without a jury, (a jury having been expressly waived by both parties in open court,) after hearing the proofs and allegations of the parties, he found the following facts :

First. That the defendant purchased of the plaintiff in the year 1859, 34 ~~144~~ cords of stone near Rome, Oneida county, for which he agreed to pay the sum and price of \$100.

Second. That in the year 1857 the defendant paid and advanced for the plaintiff, at his request, the sum of \$32.09.

Third. That in the year 1858 the said plaintiff, defendant, De Witt C. Stephens and one Truesdell, were equally interested in a bid for work on the Seneca river improvement; that the said bid was made out in the name of the plaintiff; that after the bid was made, the plaintiff, defendant, Stephens and Truesdell, sold out said bid to one Harroun for \$400, receiving his note therefor—one quarter of said note and the avails thereof belonged to each of said four parties; that after the said note was received from Harroun, by an agreement and arrangement between the said plaintiff and the defendant, Stephens and Truesdell, the same was left with the plaintiff for collection, one quarter of the proceeds of said note to be paid over to Stephens, and one quarter to Truesdell, and one quarter to Bennett, when collected; that about the month of April, 1859, the

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plaintiff collected the full amount of said note, and out of the avails thereof paid over to said Stephens \$100, the amount of the proceeds of said note belonging to him, and also paid over to said Truesdell \$100, the amount of the proceeds of said note belonging to him, but he did not pay over the \$100 collected on said note belonging to said Bennett, but promised and agreed to and with said Bennett to pay the same and apply the same on their deal in the settlement thereof.

The plaintiff, upon the settlement of the case, requested the judge to find the following facts, and the judge found according to said request :

First. That there was an agreement in the nature of a copartnership made between the plaintiff, defendant, Stephens and Truesdell, in relation to the proposal made by the plaintiff for the Seneca river improvement, a part of the Oswego canal, in the fall of 1858.

Second. That such agreement was secret and not generally known.

Third. That Charles Truesdell was then an engineer, and acting in that capacity, upon the New York state canals.

Fourth. That the proposal for such public work was made in the plaintiff's name alone.

Fifth. That the defendant Bennett and D. W. C. Stephens signed said proposal as the plaintiff's sureties.

Sixth. That there was an agreement made between them and Harroun that they should withdraw their claim for said public work and sell the bid to Harroun.

Seventh. That the defendant, Bennett, personally assisted in the negotiation and sale to Harroun.

From the foregoing facts the judge found and decided, as conclusions of law, that although the relinquishment of the bid by Willard H. Bennett, Samuel Woodworth, De Witt C. Stephens and Charles Truesdell, and their sale to Elliott Harroun for the consideration of \$400, was illegal, and contrary to public policy and void, yet, that

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when Harroun gave his note to them for the payment of the same for their joint and equal benefit, and the same was afterwards paid to Samuel Woodworth, he could not set up the illegality of the transfer of the bid to Harroun to avoid the payment of one fourth thereof to Bennett, the defendant in this action.

He further found and decided that the defendant was entitled to recover of and from the plaintiff the sum of \$32.09, and interest since 1857, and the further sum of \$100, collected as aforesaid, and interest since the year 1859, less the sum of \$100 for said stone, and interest thereon since the year 1859, making a balance of \$57.06, for which sum, with interest from date, judgment was ordered, with the costs of the action in favor of the defendant.

G. F. Bicknell, for the appellant. I. The transaction, as found by the court, shows three separate and distinct contracts. 1st. The contract of copartnership, or the contract that the plaintiff, the defendant, Stephens and Truesdell should be jointly interested in the plaintiff's proposal for the Seneca river improvement and its proceeds. 2d. The contract between the partnership and Harroun by which the bid was relinquished and sold to Harroun. 3d. The contract implied by law on the plaintiff's part to pay the defendant all the moneys belonging to the defendant, that were received by the plaintiff, or the weaker contract, as found by the court, that the plaintiff promised to pay one fourth part of the Harroun note to the defendant, and apply the same on their deal.

II. The court found and decided as matter of law, that the first contract—the agreement of copartnership between the plaintiff, the defendant, Stephens and Truesdell—was illegal, and not capable of being enforced between the parties to the same. There is but one question on this appeal, and that is, Will the courts enforce the obligations of an illegal partnership between its members? The

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agreement between the plaintiff, the defendant and Truesdell, to make the proposal for the Seneca river improvement in the plaintiff's name alone, and share the profits thereof, was illegal, made in contravention of the statutes of this state, imposing certain conditions and restrictions upon such proposals for public work upon the New York state canals, and that those statutes, if not in express words, yet by plain implication and manifest intention, prohibit such a transaction as the defendant sets forth and proves as the basis upon which his counter-claim rests. If the respondent be permitted by this court to recover one fourth part of the Harroun note, then this court must enforce an illegal partnership agreement, because it is only through and by virtue of such an illegal agreement that the respondent asserts his claim. Though the relinquishment by the plaintiff of his proposal to Harroun, conceded to be illegal, was not such an illegality as would preclude a member of a legally constituted partnership to recover from his copartner a share of the avails of such illegal relinquishment received by such copartner, yet when the partnership is an illegal partnership; when the law prohibits the members thereof from forming such a partnership; when all are equally guilty of violating the law and are participants in such violation, then such partnership is illegal, and the maxim prevails when an action is brought to enforce the partnership agreement, *potior est conditio defendentis*.

III. It is also conceded by the defendant's attorney and found by the court, that the relinquishment of the bid and the sale to Harroun for \$400 was illegal, contrary to public policy, and void. This being conceded, no argument is required upon this point, and the case of *Sharp v. Wright and McDonald*, (35 Barb. 236,) settles the question that such relinquishment was illegal, contrary to public policy, and void.

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IV. The contract implied by law that the plaintiff is bound to pay the defendant all moneys received by him, that legally belonged to the defendant, or the express contract that the plaintiff would pay the defendant one fourth part or the Harroun note or apply it on their deal, rests wholly upon the legality of the transaction. If there were no legal obligation on the part of the plaintiff to pay the defendant one fourth part of the Harroun note, his express promise is without consideration, is a mere naked promise and without validity. If the whole \$400 received by the plaintiff for the sale and withdrawal of his proposal belonged solely to the plaintiff, as all the papers show that it did, then there is no consideration for such promise, and if it appear that the defendant can claim only one fourth part of the Harroun note through an illegal and void agreement of partnership, then the plaintiff's promise to divide, pay or apply afterwards upon their deal is of no force or validity, and the finding by the court, that the plaintiff "promised and agreed to and with the defendant to pay the same and apply the same on their deal on the settlement thereof, amounts to nothing, only so far forth as it rests upon an obligation which the law will enforce. If the promise had been in writing—if the plaintiff had given the defendant his note or his bond—it could not be collected by the defendant if the transaction were illegal. (*Brown v. Tarkington*, 3 Wall. 377. *Steers v. Lashley*, 6 Term Rep. 61. *Brown v. Turner*, 7 id. 630. *Pole v. Harrobin*, 9 East, 416, n. *Paxton v. Popham*, Id. 408; *Shackell v. Rosier*, 2 Bing. N. C. 646. *Duvergier v. Fellows*, 5 id. 348. *Gray v. Hook*, 4 Comst. 449.) The express promise is equally tainted with the illegality as the implied promise. (*See DeBagnis v. Armistead*, 10 Bing. 107; *Ribbans v. Cuckett*, 1 Bos. & Pul. 265; *Aubert v. Maze*, 2 id. 371; *Fisher v. Bridges*, 3 El. & Black. 642; 3 Bos. & Pul. 252, n.; *Smith v. Ware*, 13 John. 259.)

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V. The contract of copartnership between the plaintiff, the defendant, Stephens and Truesdell was illegal, contrary to public policy, made in contravention of the statutes of this state, and not capable of being enforced between the parties to the same. (*Armstrong v. Armstrong*, 3 *Mylne & Keen*, 45; *Fraser v. Hill*, 1 *McQueen*, 392. *Griswold v. Waddington*, 16 *John*. 438. *Williams v. Jones*, 5 *Barn. & Cress*. 108. *Edmonson v. Davis*, 4 *Esp.* 14. *O'Connor v. Bradshaw*, 5 *Ex.* 882. *Ottley v. Browne*, 1 *Ball & Beatty*, 360. 3 *N. Y. Stat. at Large*, 163, 184. *The People v. Utica Insurance Company*, 15 *John*. 380, 381. *Tounele v. Hall*, 4 *N. Y. Rep.* 144, 145. 2 *R. S. Edm. ed.* 696, § 39. 1 *Kent's Com.* 9th ed. 525. *Griffith v. Wells*, 3 *Denio*, 226. *Stradling v. Morgan*, *Plowd.* 2069. *Life Ins. Co. v Mechanics' Ins. Co.*, 7 *Wend.* 31. *People v. Draper*, 15 *N. Y. Rep.* 558. *Wilkinson v. Adams*, 1 *Vesey & B.* 466. *Barton v. Port Jackson, &c.* 17 *Barb.* 404. *Camden v. Anderson*, 6 *Term. Rep.* 723. *Harris v. Runnels*, 12 *How. U. S.* 79. *Armstrong v. Lewis*, 4 *Moore & Scott*, 1. *S. C.* 2 *Camp. & Mees.* 284. 3 *Myl. & Keen*, 45. *Gordon v. Houden*, 12 *Clark & Fin.* 237. *Ewing v. Osbaldiston*, 2 *Myl. & Craig.* 53. *DeBegnies v. Armistead*, 10 *Bing.* 107. *Booth v. Hodgson*, 6 *Term. Rep.* 405. *Ex parte Bulmer*, 13 *Vesey*, 313. *Mitchell v. Cockburne*, 2 *H. Black.* 379. *Sullivan v. Greaves*, 6 *Term. Rep.* 406, n. *Knowles v. Haughton*, 11 *Vesey*, 168. *Everett v. Blackburn*, 2 *Stark.* 66.) These cases, being decisions where different prohibitory statutes have come in question, establish the principle that partnerships are illegal when the members thereof, in the formation of such partnership, agree to violate and do violate the spirit and policy of public statutes. And most of the prohibitory statutes referred to, require an affidavit to be made by the parties interested, in tenor and effect similar to that required by the statutes of this state to be affixed to proposals for public work.

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VI. The agreement in the nature of a copartnership between the plaintiff, the defendant, Stephens and Truesdell, was also illegal, because Truesdell was an engineer. The statutes, (3 *N. Y. Stat. at Large*, 184, § 11, and 3 *id.* 163,) among other officers prohibit engineers being interested in any contract on the canals, either in their own names or in the name of any other person, either as a contractor, surety, or otherwise, and prohibits them, either directly or indirectly, deriving any benefit from the ordinary or extraordinary expenditures on the canals beyond their established compensation. The court has found that Truesdell was an engineer, and acting in that capacity upon the canals, and that he, with the plaintiff, the defendant and Stephens formed the copartnership. The statutes above cited prohibit this, and this makes the partnership illegal. The partnership between the plaintiff, the defendant, Stephens and Truesdell, was illegal, because Truesdell was an engineer. Truesdell did not want to sign the papers, because he was an engineer. All the parties knew that Truesdell's connection with them was in violation of the law, and his name must not appear in the papers. This alone shows a conspiracy to violate the law, and puts an end to the defendants' counter-claim. (*See Hall v. Franklin*, 3 *Mees. & Welsb.* 259; *Ottley v. Browne*, 1 *Ball & Beaty*, 360; *Williams v. Jones*, 5 *Barn & Cress.* 108; *Hopkinson v. Smith*, 1 *Bing.* 13; *Gilfillan v. Henderson*, 2 *Clark & Fin.* 1; *Tench v. Roberts*, 6 *Mad.* 145; *Gillow v. Lillie*, 1 *Bing. N. C.* 695.)

VII. There is a distinction between enforcing illegal contracts and enforcing a claim to moneys which have arisen from such contracts. If there were no other illegal contract in this case than the contract between Woodworth and Harroun in relation to the sale and relinquishment of the proposal for the Seneca river improvement, then there would be great force in the position that such illegal contract is complete and ended; that there was nothing illegal in Harroun paying the \$400 note to Woodworth,

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though he could not be compelled legally to pay it, and nothing illegal in Woodworth receiving the money. Therefore if one fourth part of the Harroun note legally belonged to Bennett, Woodworth must pay it over; he cannot take advantage of the illegality between himself and Harroun, which is complete and ended; to retain the money he has received; and a judgment that Bennett is entitled to recover from Woodworth one fourth part of the Harroun note, does not enforce the illegal contract between Woodworth and Harroun. But in this case, to permit Bennett to recover from the plaintiff one fourth part of the Harroun note, he must establish, as his foundation, a partnership between the plaintiff, defendant, Stephens and Truesdell, and if, while establishing such partnership, he shows that such partnership is illegal, then he cannot recover, because the courts will not enforce an illegal partnership agreement, and that which is sought to be enforced in this case is a promise implied by law, or expressly made by one member of an illegal partnership to divide the plunder resulting from the illegal combination. The finding and decision of law and the exceptions thereto were not inserted by the appellant, and do not accord with his theory of this case. There is no principle of law better settled than this, that the courts will not enforce illegal contracts; but if money has been paid to an agent for the use of his principal, the legality of the transaction of which the money is the fruit, does not affect the right of the principal to recover it out of the agent's hands. The illegal contract being ended, the agent, whose liability arises solely from the fact of having received the money for another's use, can have no pretense to retain it. If A lend B a sum of money, B cannot withhold payment by showing that A acquired the money illegally, and when a third party pays money to B, as the money of A, and with instructions to B to deliver it to A, it is immaterial to B whether the money arose from an

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obligatory or a void and illegal contract. (*See Tenant v. Elliott*, 1 Bos. & Pul. 3; *Farmer v. Russell*, Id. 296; *Merritt v. Millard*, 5 Bosw. 649; *Murray v. Vanderbilt*, 39 Barb. 141; *Alvord v. Latham*, 31 id. 295; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. U. S. 232; *Thomson v. Thomson*, 7 Vesey 470; *Simpson v. Bloss*, 7 Taunt. 246.) Without multiplying cases, it clearly appears that the courts will not enforce illegal contracts, but will permit a recovery of the fruits of an illegal contract where the parties to the action are not participants in the illegal contract, and where the liability does not arise from the illegal contract itself, but is collateral to and independent of it. The principle which governs the decisions in *Tenant v. Elliot* and *Farmer v. Russell*, is most clearly defined in the latter case, where the court sent back the case for a new trial to ascertain whether the defendant was a participant in the illegal contract, and has no application to the case in hand. Strange as it may seem in morals, yet in the law governing this peculiar subject—law not based upon the rights of the parties, but adopted for the protection of the courts—none but a *participator in the offense* is permitted to suggest the impurity of the transaction for the consideration of the court and thus incidentally avail himself of the rule. To go further than this would be impracticable, and would outlaw all property dishonestly obtained, effectually preventing its ever forming the valid consideration for a promise, either expressed or implied, and involve the court in an endless task of ascertaining and determining the rectitude of the means by which all property had been attained. While in going so far the court protects its purity and dignity by refusing to sit as umpire among thieves and to distribute their plunder according to the terms of their confederacy. In *Tenant v. Elliott*, the broker, who was no party to the offense by which the money was obtained, was compelled to pay over the money he had received to

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another's use, while in this case the court is asked by one partner in an illegal combination and confederacy to apportion the gains of an illegal partnership among its members, or to let the law raise an undefiled promise from a corrupt agreement. It may even be conceded that the law as adjudged in *Faikney v. Reynous*, (4 Burr. 2069,) and in *Petrie v. Hannay*, (3 T. R. 418,) to be sound and unquestionable, which adjudges that a bond given for a share of moneys illegally obtained, after the offense was committed and the illegality ended, may be enforced in a court of law. And it may even be conceded that a promissory note, which imports a consideration and *prima facie* sustains a recovery without resort to the illegality out of which it arose, may be enforced, though the preponderance of authority is unquestionably against both propositions, (*Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Gaslight Co. v. Turner*, 5 Bing. 666; *Cannan v. Brice*, 3 Barn. & Ald. 179; *McKinnell v. Robinson*, 3 Mees. & Wels. 434;) for this case steers entirely clear of these questions, in this, that here both the express promise and that which would, but for the illegality, be implied by law, depend upon and arise directly out of the illegality itself, and which is their only source of consideration and support. If the agreement between the plaintiff and Harroun took place as the plaintiff states it, and if the agreement in the nature of a partnership were legal and capable of being enforced, then the defendant ought to recover one fourth part of the Harroun note, and the appellant is willing to concede as a question of law, that where there is a legal partnership and that partnership engages in an illegal adventure from which gain or profits arise for the partnership, and one of the partners receives these gains or profits, he must account to his partners; he cannot retain what he has received on the ground that it was the fruit of an illegality between the partnership and another. But if the transaction between the plaintiff and Harroun took place as

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the defendant states it, then the defendant was a *particeps criminis* in the illegal transaction between the plaintiff and Harroun, and under the cases cited cannot recover. Above all, the defendant cannot recover one fourth part of the Harroun note, when the agreement of partnership and the partnership itself, upon which he relies as the foundation of his claim, was illegal, in violation of law, and in fact void and no partnership.

VIII. The defendant, when he signed the plaintiff's proposal as one of his sureties, and took it to the engineer's office and presented it to the contracting board, became estopped from coming into a court of justice and claiming that he was a principal. He held out to the canal officers and the world that the plaintiff alone was the principal; that with him the contract for the work should be made. By signing as surety, he agreed with the plaintiff and with the canal officers that Woodworth alone was interested in the proposal, and the plaintiff says, "Before the bid was made out Bennett and Stephens concluded to sign my proposal as sureties for me and let me bid alone for the work, which I did." (*Sinclair v. Jackson*, 8 Cowen, 586. *Demeyer v. Legg*, 18 Barb. 20. *Torrey v. Bank of Orleans*, 9 Paige, 659.)

John Snow, for the respondent. The judgment should be affirmed for the following reasons:

I. Although Harroun may have had a good defense to the \$400 note, by reason of the illegality of the original bid and the sale thereof, he did not avail himself of that defense, but paid over the money. This gives the plaintiff no right to retain the \$100 belonging to Bennett. The case stands precisely the same as if Bennett had been solely interested in the bid and sale thereof, and the \$400 had been paid to Woodworth as Bennett's agent. It could hardly be claimed that Woodworth could retain the \$400 of Bennett's money, because it had been paid on an ille-

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gal contract. The sale of the bid was executed and money paid over. (*Tenant v. Elliott*, 1 Bos. & Pul. 3, and *Farmer v. Russell*, Id. 296, referred to and approved in 9 Wend. 175.) None of the authorities cited by the plaintiff reach this case, but they repeatedly cite, with approval, the above cases in 1 Bos. & Pul. which in principle are the same as the case at bar.

II. Before and after the money was paid it was expressly understood and agreed between the plaintiff and the defendant that the \$100 should be turned on the other deal between them. After such application of the money, it was out of the power of Woodworth to overturn such application and charge Bennett with the indebtedness upon which the \$100 had already been applied. The original contract of sale was executed and placed beyond the reach of the court, even had it been an illegal contract. The defendant was in no manner compelled to resort to the original bid or the sale to Harroun, to uphold the claim to this \$100 of his own money, which had come into Woodworth's hands.

III. The whole question has been passed upon at general term, and it is the well settled practice of this court that the general term will not overrule its own decision upon a question, but leave the party to his remedy by appeal to the Court of Appeals.

By the Court, BACON, J. This is the second time this case has been before this court, upon substantially the same state of facts. The only point presented is, whether the \$100 which had been paid by one Harroun to the plaintiff, for the use and benefit of the defendant, should be allowed as a set-off to the claim proved by the plaintiff in this suit. On the first trial, before a referee, he disallowed this claim, and reported in favor of the plaintiff. Upon an appeal to this court, the judgment was reversed, and a new trial ordered; and the point seemed to us then so

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clear, and the error so manifest, that the reversal was made substantially upon the argument, and no written opinion was prepared. The new trial took place at the circuit, before Justice Morgan, and he has rendered a judgment for the defendant following the opinion of the general term, from which judgment the plaintiff has now taken an appeal, and submits the case to our farther consideration. It is not the custom of this court to hear a re-argument in a case where its judgment has been deliberately given and announced, and we should not be justified in departing from that rule in this case, but for the fact that we rendered the judgment without accompanying it with the reasons upon which it was founded, and out of deference, in part, to the elaborate argument of the counsel for the plaintiff, and the great earnestness and evident sincerity with which his views are urged.

The facts so found by the judge, present the following case. The plaintiff and defendant, together with Stephens and Truesdell, (the latter of whom was an engineer on the canals,) had sold out a bid for some public work on the canal to one Harroun, who gave, upon such purchase, his note for \$400 to the plaintiff, one quarter of which was to be paid to each of the said four parties. The note was duly paid to the plaintiff and he paid over to Stephens and Truesdell, respectively, their shares, retaining his own, but refused to pay the \$100 to the defendant, agreeing, however, to apply the same upon their mutual dealings when they should come to a settlement. It is this \$100 which forms the subject of the set-off claimed in this case, and the judge, as a conclusion of law from these facts, finds that although the sale of the bid was illegal and void, yet that when Harroun gave his note on that consideration and for the benefit of all the parties, and afterwards paid it to the plaintiff, he could not set up the illegality of the sale of the bid to Harroun, to avoid the payment of the one

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fourth thereof to the defendant, and the set-off was consequently allowed.

The counsel for the plaintiff expends a large amount of labor and learning to prove that the contract of partnership between the plaintiff, the defendant, Stephens and Truesdell was illegal, contrary to public policy, and made in contravention of the statutes of the state, and therefore incapable of being enforced between the parties to the same. The counsel might have saved himself this unnecessary expenditure of strength, because the decision of the case proceeds upon a concession of the entire illegality of that transaction. Nothing is clearer than that, being so, it could not have been enforced between the immediate parties; that is to say, Harroun could have successfully resisted the payment of the note, and the defense of the illegality of the transaction out of which the note arose, would have been a perfect defense to an action brought to collect it. But this he failed, or did not choose to do. If there was to be "honor among thieves," he proposed to maintain his to the extent of paying what he had agreed to pay, leaving the plaintiff to distribute the spoil rateably among those entitled to it. Having done this, the partnership was *functus officio*—it had accomplished its whole work, and nothing remained to be done to carry out its objects, or further its designs. Thenceforth the plaintiff became a mere depositary of the money for the benefit of those entitled to share in it, among whom was the defendant. It was, in effect, money had and received to the use of the defendant, and which the plaintiff, in addition to his original obligation as substantially a stakeholder, had promised to pay to the defendant. He cannot be permitted to escape from this obligation upon the plea that he received this money as the fruit and result of an illegal transaction; and being himself in that transaction *particeps criminis* with the defendant, the latter has no better stand-

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ing than he, and is not entitled to reclaim the money thus paid to the plaintiff for his use.

It seems indeed somewhat of a solecism in morals that no one but a participator in the offense shall be permitted to avail himself of the illegality of a transaction, for his protection from responsibility in respect to it, but such is the undoubted rule when the transaction itself is directly in issue and is sought to be enforced. The courts have adopted this rule in part for their own protection, and to avoid being obliged to play the role of an umpire among felons, and aid one knave at another's expense, and for the benefit of him who equally comes into court with soiled garments and unwashed hands. But to go farther than this, and to hold that after the illegal contract has been fully performed, and no aid is sought to uphold and enforce it, a party who has received money paid in execution of the contract for the benefit of another, shall be allowed to fall back on the illegality of the original transaction to screen him from the discharge of what is a mere agency, would be refining, beyond any reasonable degree, and carrying the immunity of a participant in such prior illegal transaction to a needlessly, fastidious and even romantic extent.

It is conceded by the counsel for the plaintiff that, if money has been paid to an agent for the use of a principal, the legality of the transaction, of which the money is the fruit, does not affect the right of the principal to recover the money from the party who has thus received it. That was decided as long ago as the case of *Tenant v. Elliott*, (1 Bos. & Pul. 3,) in which it was held that where A had received money to the use of B, on an illegal contract between B and C, he should not be allowed to set up the illegality of the contract as a defense in an action brought by B, for money had and received. The decision is very brief, but it is expressed in the nervous language and with the strong good sense which was characteristic of Mr.

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Justice Buller. "Is the man," he says, "who has paid over money to another's use, to dispute the legality of the original consideration? Having once waived the illegality, the money shall never again come back to his hands. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?" In this opinion Eyre, Ch. J. concurred, and the case states the defendant took nothing by his motion.

It is said that this case is shaken, if not overruled, by the case of *Farmer v. Russell* decided by the same court in the same volume of *Bos. & Pul.* 296. So far from this, the court recognize fully the doctrine of *Tenant v. Elliott*, but a doubt being suggested by two of the judges how far the defendant was implicated in the transaction out of which the suit arose, it was sent back for a new trial, and nothing more is heard of it, save in a note at the foot of the case it is said, the defendant paid the money into court, satisfied, doubtless, that he could not succeed in his defense even if he could have proved that he was, as suggested by Chief Justice Eyre, "mixed up with the original contract." Buller takes occasion to say that the case could not be distinguished from *Tenant v. Elliott*, and in relation to the point of knowledge and participation by the defendant, he says it is not made out by the evidence, "nor indeed," he adds, "if it had been, would it have made any difference in the case of an action for money had and received, which is not founded on the illegal contract, but on a ground totally distinct from it. It is immaterial whether the money were paid on a legal or illegal contract. Here the money having been paid to another for the plaintiff's use, the illegal contract is out of the question." This is both good sense and good morals, and applied to this case, it indicates the simple duty which the plaintiff had to perform, to wit, to pay over the money placed in his hands as a mere depositary for the use of the defendant,

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and to which neither in morals nor in law, could the plaintiff assert the shadow of a claim. Whatever refinements have been attempted in some more recent cases to do away the authority of these early decisions, they have not attained a standing to which we are compelled to yield. On the contrary, in the very recent case of *Merritt v. Millard*, in the Court of Appeals, (not yet reported,) the doctrine of Buller is re-affirmed and applied to a case in its general features very similar to the one before us. The case was this. The plaintiff Merritt and one Brewster, had liens upon some real estate which was about to be sold on the foreclosure of a prior mortgage. Millard, the defendant, was acting as the attorney for Brewster, when the latter agreed through him to pay \$500, if Merritt would not bid at the sale. Acting on this agreement Merritt omitted to bid, and Brewster was enabled to secure the property without competition. Subsequent to the sale, and to carry out his agreement, he paid \$500 to the defendant for the benefit of Merritt, who, upon application by Merritt, refused to pay it over, and in the action brought to recover it, set up the illegality of the contract of Brewster as a defense, claiming as he did upon the trial, and on the argument in the Court of Appeals, that he was connected with the contract between the plaintiff and Brewster, that he knew the object of Brewster in paying over the money to him to be in furtherance of the illegal contract between them, and that he was acting on behalf of Brewster to complete the original contract. Conceding the illegality of the contract made by Brewster with Merritt to prevent competition on the sale, the defense was overruled, and judgment was given against the defendant Millard, and on appeal to the Court of Appeals it was unanimously affirmed. An extract from the opinion of Judge Mason, which was adopted by the court, will indicate the ground of the decision, and show that the principles announced in that case are applicable to, and govern

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the one at bar. "Whenever," he says, "the parties have executed a contract for illegal purposes, the court refuses its aid to enable either party to disturb it. Brewster could not be compelled to pay this money, but when he did pay it to the defendant for the plaintiff's use, it did not lie with the defendant to put the money in his own pocket, and refuse to pay it over. Brewster had the right to waive the defense of the illegality of the contract, and pay the money, and when he had done so and placed it in the defendant's hands upon the simple trust that he would pay it over to the plaintiff, the law enjoins that duty upon the defendant, and will not permit him to set up this defense. If the money had been paid directly by Brewster to the plaintiff, it is clear that upon the most elementary principles of law, he could retain it, as against Brewster. The money in that case would, in the strictest sense belong to him. Does it not equally belong to him when paid to another for him?" He then cites in support of these views the cases of *Tenant v. Elliott*, and *Farmer v. Russell*, thus indorsing and re-affirming the authority of those cases, and *Hamilton v. Canfield*, (2 Hall 526,) and *Armstrong v. Toler*, (11 Wheat. 258,) and adds: "The defendant's liability arose upon the receipt of the money, and it is entirely separate from and independent of the illegal contract." It is unnecessary to add any thing beyond this by way of argument, illustration or authority; for the principle stated and enforced covers the whole ground of the attempted immunity in this case, and drives the plaintiff from the covert he seeks under the shadow of the prior consummated and extinguished illegal contract.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, April 6, 1869. Bacon, Foster, Mullin and Morgan, Justices.]

HOWE V. CARPENTER.

Under the act of congress requiring stamps upon written agreements, &c. approved June 30, 1864, the invalidity of an instrument not stamped, as well as the forfeiture imposed, is made to depend upon the existence of the intent to evade the act.

That the parties to an agreement are aware of the requirement of the statute is to be presumed; and their omission to obey it must, in the absence of any explanation, be deemed willful and with intent to evade its requirements.

The act of omitting a revenue stamp is unlawful and injurious to the government, and must be deemed, presumptively, so intended. It comes within the class of cases in which the proof of justification or excuse lies with the party transgressing; and on failure thereof, the law implies a criminal intent.

The plaintiff agreed to keep for the defendant, a sow and six pigs, from the 25th of May, to the 1st of September, 1865, for which he was to be paid two pigs and \$5. The plaintiff, after having kept the animals some time, asked the defendant which of the pigs he should take. The defendant said there was no choice except, &c. and that the plaintiff might take which he had a mind to. Three or four weeks after this, the plaintiff, without notice to the defendant, selected two of the pigs and put them by themselves; and the defendant afterwards took them away without the plaintiff's consent. *Held* that the plaintiff had no right of action against the defendant for the taking of the two pigs; as he could not, under the agreement, claim pay for the keeping of the sow and pigs, until the term for which they were to be kept had expired, and the time for a choice of pigs had not arrived, when the action was brought. And that there was no such setting apart of those two pigs for the plaintiff, as amounted to a making of them over, as so much payment in advance.

A PPEAL by the defendant from a judgment of a county court.

Ballard & Warren, for the plaintiff.

Waters & Waters, for the defendant.

By the Court, PARKER, J. This action was brought in a justices' court, where the plaintiff was nonsuited. He appealed to the county court, in which the judgment of the justice was reversed, and the defendant now appeals to this court.

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The plaintiff's claim is for damages, which he has sustained, by reason of the taking from his possession, by the defendant, of the property, or a portion of it, which he held under a written agreement with the defendant, and also of some other property. The part of the agreement material to the questions in the case, is as follows: "Cortland, March 14, 1865. I, John Carpenter, agree to let James P. Howe one pair of horses, two wagons, plough and drag, for one year; and the said Howe is to keep the team well and use it well; and the said Carpenter reserves the team to do his own work, and the said Howe is to pay Carpenter \$20 at the end of one year from date." This contract was signed by both parties. No revenue stamp was affixed to it, and no reason given or offered for its absence. The plaintiff took the property mentioned into his possession, and kept it several months, when the defendant took it away, and, on demand, refused to deliver it up.

The contract was received in evidence subject to any objection to its validity.

Manifestly, unless the contract was void, for want of a revenue stamp, the nonsuit was erroneous, for the resumption of the property by the defendant was not pursuant to the reservation in the contract, of the right to use the team, by the defendant, to do his own work. The claim of right to take and detain it, was put, by the defendant, on another ground, to wit, the plaintiff's failure to keep the team well. The keeping of the team well was not a condition on which his right to retain possession of it and the other property depended; and besides, there was no evidence that he had failed to keep it well.

If the contract was void, the plaintiff had no right to retain the property from the defendant, and was, therefore, unless his claim to the other property was better founded, properly nonsuited. So that the first question is, was the contract void for want of a revenue stamp.

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This contract was made March 14, 1865, at which time the act of congress requiring stamps, approved June 30, 1864, was in operation; the act of March 3, 1865, not having gone into effect until April, 1865.

By schedule B, referred to in section 151 of the act of June 30, 1864, this contract was chargeable with a stamp duty of five cents. The effect of the omission of the proper stamp from an instrument requiring it, is declared by section 158, of the act, as follows: "That any person or persons who shall make, sign or issue * * * any instrument, document or paper of any kind or description whatsoever, * * * without the same being duly stamped, * * * *with intent to evade the provisions of this act* shall for every *such* offense forfeit the sum of two hundred dollars, and such instrument, document or paper shall be deemed invalid and of no effect." The invalidity of the instrument, as well as the forfeiture imposed, is made to depend upon the existence of the intent to evade the act. (*Beebe v. Hutton*, 47 Barb. 187.) Is that intent to be imputed in this case? That the parties were aware of the requirement of the statute, is to be presumed. (1 Bl. Com. 46. *Broom's Leg. Max.* 190.) Thus knowing the law their omission to obey it, must, in the absence of any explanation, be deemed willful and with intent to evade its requirements. In *Beebe v. Hutton*, (*supra*,) the party claiming under the unstamped instrument offered to prove that the want of a proper stamp occurred by inadvertence or mistake, and without any intent to evade the provisions of the revenue laws. This evidence was objected to and excluded. On review of the exceptions, at general term, it was held that the evidence was material and admissible, and therefore, improperly rejected, thus impliedly holding that without proof rebutting the presumption of an intent to violate the law, such presumption must prevail.

This holding is in accordance with the principle that

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every person is presumed to contemplate the ordinary and natural consequences of his own acts. (3 *Greenl. Ev.* § 14.) The act of omitting the revenue stamp was unlawful and injurious to the government, and must be deemed presumptively, so intended. It comes within the class of cases in which the proof of justification or excuse lies with the party transgressing; and on failure thereof the law implies a criminal intent. (3 *Greenl. Ev.* § 13. 1 *Id.* § 79.)

I am aware that it has been held in Massachusetts, (*Carpenter v. Snelling*, 97 *Mass. Rep.* 456,) that the provisions of the act of congress, excluding unstamped instruments from being put in evidence, and declaring them invalid, do not apply in the state courts, but in the United States courts only.

In this state, however, it has been repeatedly held otherwise, and effect has been given, in this court, to those provisions. Besides the case of *Beebe v. Hutton*, (*supra*,) see *Cole v. Bell*, (48 *Barb.* 194;) *Myers v. Smith*, (*Id.* 614;) *Hoppock v. Stone*, (49 *id.* 524.)

So far as the property contained in the contract is concerned, therefore, we must hold that the plaintiff had no right to recover for the taking and detaining of it by the defendant.

Besides the contract above mentioned, the parties made another by parol, whereby the plaintiff was to keep for the defendant a sow and six pigs, from the 25th of May to the 1st of September, 1465. This contract is given by the plaintiff in his testimony as follows: "Mr. Carpenter asked what I would keep the sow and pigs for to the 1st of September; I said I did not know; make me an offer. He said he would give me two pigs and five dollars. I said I would take them; all that was said at that time; nothing said about the time he was to pay the five dollars, as I remember. That was all the bargain made about the hogs." This agreement was on or about

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the 25th of May, and the plaintiff immediately took the sow and pigs into his possession, pursuant to the agreement. It appears that, at some time after this agreement, there was a conversation between the parties, in which the plaintiff asked the defendant which of the pigs he should take, and that the defendant said there was no choice except the boar pig, and that the plaintiff might take which he had a mind to. That three or four weeks after, the plaintiff, without notice to the defendant, selected two of the pigs and put them by themselves. On the 1st of August following, the defendant took away these two pigs, without the plaintiff's consent. There is no evidence that the defendant knew that the plaintiff had selected them for his own, and it does not appear that they were subsequently demanded of the defendant. This action was commenced on the 2d of August, 1865.

I do not think the plaintiff had any right of action against the defendant for the taking of the two pigs. He could not, under the contract, claim pay for the keeping of the sow and pigs until the term during which they were to be kept had expired. He was no more entitled to the pigs, until that time, than to the five dollars. Nor does he show himself entitled to them under what subsequently passed between the parties. There was no such setting apart of these two pigs for the plaintiff as amounted to a making them over as so much payment in advance. If the defendant offered that advantage to the plaintiff, it cannot be deemed a standing offer, running through the term, of which the plaintiff might, at any time, avail himself, without notice to the defendant. The plaintiff's title to the property could not thus be transferred without his knowledge or consent. If, under the arrangement, he had an implied right to insist that the six should, on his fulfillment of the agreement, be subject to be chosen from, so that he might then have two of a fair average value, he has not shown himself deprived of that advantage. The

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time for such choice had not arrived when he brought this action, and no right of action, in that view, had accrued.

Upon the whole case, I am of the opinion that the plaintiff was properly nonsuited, and that the judgment of the county court should be reversed, and that of the justice affirmed, with costs.

[BROOME GENERAL TERM, May 9, 1869. *Balcom, Boardman and Parker, Justices.*]

GREGG vs. PIERCE.

L. having been convicted of a felony, filed exceptions and sued out a certiorari, and being at large on bail, he left the state and failed to appear to receive sentence. The defendant, who was one of his bail, thereupon executed a writing offering a reward of \$250 to any person who should take and safely lodge L. in the Elmira jail, and delivered the same to the plaintiff, who was sheriff of Chemung county. The latter pursued L. to Illinois, and there, under a requisition from the governor of this state, arrested L. and lodged him in the jail at Elmira. *Held* that an action would lie against the defendant, to recover the reward offered by him.

Held, also, that the fact that the plaintiff was sheriff, or that the requisition upon the governor of Illinois described him as sheriff, added nothing to his authority under the requisition, and that he must be deemed to have made the arrest as a private citizen, merely, and not as sheriff.

And that the statute prohibiting sheriffs or other officers to whom fees are allowed by law for any service, from taking or receiving any other or greater fee or reward, for services rendered, than such as are allowed by law, when construed according to its spirit and meaning, did not affect the plaintiff's right to recover such reward.

The cases of *Hatch v. Mann*, (15 Wend. 44,) and *Hary v. Osgood*, (2 Hill, 216,) distinguished from the present.

THIS action was tried at the Chemung circuit, without a jury, in September, 1859. The plaintiff recovered a judgment against the defendant for \$272.27 damages, and \$46.85 costs, amounting in all to \$319.12. The defendant appealed from the judgment to the general term of this court.

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Thurston, Hart & Benn, for the plaintiff, cited *Code*, §§ 147, 148, 149; 5 *Metcalf*, 57; 15 *Wend.* 44; 2 *Burr.* 924; 2 *R. S.* 4th ed. 839, § 5; 2 *Paige*, 570; 2 *Har. & G.* 54; 1 *Greenl. Ev.* § 458.

G. L. Smith and *Hiram Gray*, for the defendant, cited 15 *Wend.* 44-46; *Act of Congress*, February 12, 1793; 3 *R. S.* 3d ed. 1043, § 52; 2 *id.* 2d ed. 51, § 5; 2 *Hill*, 216; 4 *Jac. Law Dic.* 433, title *Office*; *Sewall on Sheriff*, 458; 1 *Pick.* 171 and 173; 7 *id.* 279; 1 *Hill*, 87.

By the Court, BALCOM, J. The written promise of the defendant to pay any person or persons \$250 reward, who should take and safely lodge in the Elmira jail, George Loop, was executed and delivered to the plaintiff on the 26th day of May, 1858. The plaintiff, as sheriff of Chemung county, was then under no obligation to arrest Loop and lodge him in jail. He had no process for his apprehension. Loop had previously been convicted of the crime of robbery, in the Chemung oyer and terminer, and had taken exceptions on his trial; his sentence had been stayed; a certiorari had been sued out, and the exceptions had been removed into this court. He had been permitted to go at large, upon the defendant and another becoming bail for his appearance at the next term of said court of oyer and terminer; and he had not appeared at such term, although this court, after determining that none of his exceptions were well taken, had required him to do so, to receive sentence; but he had left the state; and where he was, neither the plaintiff nor defendant had any knowledge. It was upon this state of facts that the plaintiff concluded to attempt to find Loop, and safely lodge him in the Elmira jail, with the expectation, if he succeeded, of receiving the \$250 reward promised therefor by the defendant.

It is clear that if the plaintiff had been so fortunate as

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to have caught Loop in sight of the Elmira jail, before he obtained either of the requisitions hereinafter mentioned, and safely lodged him in said jail, he would have been entitled to the \$250 reward from the defendant.

It is claimed by the defendant's counsel that because the plaintiff, after he received the defendant's written promise, sent to Albany and procured a requisition from the governor of this state upon the governors of South Carolina and Illinois for Loop, as a fugitive from justice, and used the one upon the governor of the last mentioned state, in taking him from that state to the Elmira jail, where he safely lodged him, he cannot recover the \$250 reward of the defendant. And it is urged by the defendant's counsel that this position is strengthened by the fact that the plaintiff's accounts for expenses and services, in going to South Carolina in search of Loop, and in going to Illinois and bringing him from that state to the Elmira jail, were audited by the comptroller of this state and paid out of the treasury thereof.

The plaintiff paid a person \$25 for going to Albany after one of the requisitions, and another \$50, by his note, for information as to where Loop was; which sums were not included in his accounts that were audited by the comptroller and paid out of the treasury. And it is not probable that the plaintiff would have procured either of the requisitions, or taken any steps to find Loop, if he had not been moved to do so by the defendant's promise of \$250 reward.

The fact that the plaintiff was sheriff of Chemung county, or that the requisition upon the governor of Illinois described him as sheriff, can have no influence in the case; for the judge, before whom the cause was tried, had found he did not act as sheriff, in taking Loop, or in bringing him to the Elmira jail. Besides, the fact that he was sheriff added nothing to his authority under the

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requisitions. I think what he did must be regarded done by him as a citizen and not as sheriff.

The defendant's counsel mainly relies on two sections of the Revised Statutes and two decisions of our courts to sustain the position that the defendant is not liable to pay the \$250 according to his promise. He insists that the promise is void by statute.

The case is not like that of *Hatch v. Mann*, (15 Wend. 44.) In that case Hatch had procured a warrant against one Gallup, and promised Mann, who was a constable, and obliged by law to serve it after it was delivered to him, to pay him an extra compensation if he would arrest Gallup on it in the night, which he did. Mann made the arrest as constable, and it was held he could not recover the extra compensation promised him, because he rendered the service as constable, his fees therefor being prescribed by law. In this case the defendant had no warrant or process for the apprehension of Loop, and the plaintiff received none, *as sheriff*, that authorized him to arrest Loop. The requisition upon the governor of Illinois only constituted the plaintiff an agent of the governor of this state to take Loop. The case of *Parker v. Newland* (1 Hill, 87) is not any more favorable to the defense in this action than *Hatch v. Mann*, (*supra*.) And that of *Harp v. Osgood* (2 Hill, 216) does not sustain the position of the defendant's counsel in the least.

One of the sections of the statute relied upon by the defendant's counsel is as follows: "No judge, justice, sheriff or other officer whatsoever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service, but such as is or shall be allowed by the laws of this state." (2 R. S. 650, § 5.) I think if this section prohibits persons who render services in their private characters from receiving extra compensa-

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tion or rewards therefor, it only does so when the amount of their fees or compensation for the particular service is fixed by law, and does not rest in the discretion of some officer or board. (*See 15 Wend. 48.*) And as the services in this case were performed by the plaintiff in his private character, and not as an officer, and his accounts therefor, so far as the state or the governor thereof was concerned, were to be audited by the comptroller, according to his views of the correctness and justice thereof, the plaintiff could lawfully receive a reward from the defendant for the same services he was paid for out of the treasury of the state. I think the statute above quoted, when construed according to its spirit and meaning, does not in the least affect the right of the plaintiff to recover the reward promised him by the defendant. If it had been literally construed, in years gone by, it would have prevented attorneys and counselors, under former statutes that prescribed their fees, recovering any extra compensation for their services under a *quantum meruit*. But it was not so construed. (*See Adams v. Stevens, 26 Wend. 451.*)

The statute, under which the plaintiff obtained compensation of the state for his expenses and services, declares: "When the governor of this state, in the exercise of the authority conferred by the constitution of the United States, or by the laws of this state, shall demand from the governor of any state or territory in the United States, or from the executive authority of any foreign government, any fugitive from justice, the accounts of the *persons employed* by him for that purpose, for their services, shall be audited by the comptroller, and paid out of the treasury." (2 R. S. 748, § 45.)

The statute authorizes the governor to employ any person he chooses, to go in search of fugitives from justice, and empowers the comptroller to fix their compensation for their services. (*Crocker on Sheriffs, § 1102.*) In audit-

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ing accounts for such services, I suppose the comptroller may take into consideration the fact that the persons who rendered them have received or are to receive rewards therefor from individuals, and that they procured the requisitions with the view of obtaining rewards of individuals if they should succeed in finding the fugitives and bringing them back to this state. Perhaps the comptroller fixed the plaintiff's compensation for his services under the two requisitions for Loop, at only \$42, for the reason that he supposed the plaintiff would receive \$250 reward of the defendant.

The plaintiff spent twenty-one days in search of Loop, under the two requisitions, and about four weeks looking after him, by reason of the reward promised by the defendant for his safe lodgment in the Elmira jail. He accomplished precisely what the defendant desired him to do, viz., the arrest of Loop and his safe lodgment in the Elmira jail. And it was wholly immaterial to the defendant what means the plaintiff used in doing the business. It was the thing to be done, and not the manner of doing it, to which the defendant's promise applied.

My conclusion is that the defendant's promise was valid, and entitled the plaintiff to recover. But the judge at the trial overlooked the fact, stated in the complaint, that \$56.75 was paid by the defendant to the plaintiff on the 4th day of December, 1858, towards the reward for which the action was brought. The plaintiff therefore recovered too large a judgment; and for this reason it must be reversed, and a new trial granted in the action, costs to abide the event; unless the plaintiff shall, within twenty days deliver to the defendant's attorney a stipulation to the effect that the sum of \$56.75, with interest thereon from the 4th day of December, 1858, shall be deducted from the judgment when paid. But if such stipulation be given, then the judgment in the action shall be affirmed, with

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costs; and a copy of such stipulation, with proof of service on the defendant's attorney, shall be included in the affirmance roll.

[BROOME GENERAL TERM, July 10, 1860. *Mason, Balcom, Campbell and Parker, Justices.*]

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TINKHAM and others vs. THE ERIE RAILWAY COMPANY.

A railroad company, on purchasing land, has the right to pay a part of the consideration therefor, by keeping open portions of the same as public streets. Hence a condition in the deed that certain portions of the land conveyed shall be kept open as public streets, is not void as imposing a duty or trust upon the corporation inconsistent with its business, and outside of the objects for which it was formed.

Whenever the reversion is granted by the maker of a condition contained in a previous grant, the condition is gone.

Where land is conveyed as one piece, subject to a condition, the condition is entire, and a breach of it gives the grantor or his heirs the right to re-enter and take the whole land. The land being a single parcel, the condition on which it was conveyed cannot be apportioned by the grantor.

Where the grantor in a conveyance of land as one parcel, on condition, subsequently conveys a portion of the land to another, the latter conveyance, though void as against the previous grantee, is operative as between the parties to it, destroys the condition in the original deed, and passes the grantor's title, or whatever other rights he had to the land embraced in it, and estops him, or his heirs, from recovering any portion of the land which it purports to convey, for a breach of the condition.

THE plaintiffs were nonsuited at the Tioga circuit in March, 1865, and after judgment was entered against them for costs, they appealed to the general term of this court.

Charles A. Munger, for the plaintiffs.

George S. Camp, for the defendant.

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. *By the Court*, BALCOM, J. The defendant occupies the land in dispute, in virtue of a title derived under a deed given by John R. Drake to the New York and Erie Railroad Company; which deed contains this clause, namely: "To have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, their successors and assigns forever; only, however, for purposes connected with the legitimate business of said New York and Erie Railroad Company; to have and to hold as aforesaid all that part of the above described premises lying easterly of McMaster street, except that part which is embraced by a line drawn parallel with and two and a quarter rods distant from said center line on each side of the same, upon the further condition that said company shall keep and place their passenger depot on the east side of the street known as Ithaca street, formerly the Ithaca and Owego turnpike, and that forty feet in width of the lands hereby conveyed on the south side thereof from said Drake's east bounds to Ithaca street; thirty feet in width from said Ithaca street to the Cayuga and Susquehanna Railroad, *shall be kept open as a public street*; also that thirty feet in width on the north side of the land hereby conveyed from the Cayuga and Susquehanna Railroad, to the east bounds of said Drake's land, except on the space between Ithaca street and the junction of West Avenue with the lands hereby conveyed, shall be kept open as a public street."

The plaintiffs claim the land in dispute, as heirs or devisees of the said John R. Drake, now deceased; and they insist that the defendant, as successor of the New York and Erie Railroad Company, is not entitled to hold such land, for the reason that the portions thereof which, by the terms of said deed, were to be kept open *as public streets*, have not been so kept open, but have been obstructed by a storehouse, and by lumber, earth and other things which the defendant's agents and servants placed upon the same.

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It is quite clear that the defendant took the land in dispute subject to the condition contained in Drake's deed, and that the defendant broke such condition by obstructing the portions of the land which should have been kept open as public streets.

The defendant's counsel made the point, upon the trial, and insists upon it here, that the condition in Drake's deed imposed a duty or trust upon the New York and Erie Railroad Company inconsistent with the business of that company, and outside of the objects for which such company was formed, and that consequently it was void as to that company, and is not binding upon the defendant. But I am unable to agree to this proposition. I think the railroad company had the right to pay part of the consideration for the land they purchased of Drake, by keeping open portions of the same as public streets. The true rule, applicable to the question, was stated by Chancellor Walworth, in the *Matter of Howe, executor, &c.*, (1 *Paige's Ch. Rep.* 214,) which is: "Where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, the power to execute that part of the trust which relates to others."

The condition in Drake's deed did not require the railroad company to have any portion of the land described in it made public streets by officers of the town, but only required the company and their successors to keep such portions open as public streets; which the railroad company and the defendant could very easily have done.

The defendant's counsel claims that Drake or the plaintiffs have done acts that amount to a waiver of the right of forfeiture for the breach of the condition in the deed referred to. But aside from the conveyance to the Cayuga and Susquehanna Railroad Company, which I shall

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presently consider, I very much doubt whether any or all of the acts of Drake and the plaintiffs constitute such a waiver. Their acts differ from those that were held to constitute a waiver, in *Ludlow v. The N. Y. and Harlem R. R. Co.*, (12 *Barb.* 440.) And see *Jackson v. Crysler*, (1 *Johns. Cases*, 125;) *Gray v. Blanchard*, (8 *Pick.* 284;) and *Washburn on Real Property*, (vol. 1, p. 455.)

The conveyance executed by Drake to the Cayuga and Susquehanna Railroad Company covered a part of the land in dispute. That deed, though void as against the N. Y. and Erie Railroad Company and the defendant, was operative as between the parties to it, and passed Drake's title, or whatever other rights he had to the land embraced in it. (*Livingston v. Proseus*, 2 *Hill*, 526. *Cameron v. Irwin*, 5 *id.* 272.) That deed certainly estops the plaintiffs from recovering any portion of the land which it purports to convey; and title in a third person is always a defense to an action of ejectment. (*Bloom v. Burdick*, 1 *Hill*, 130.)

The whole of the land in dispute was conveyed as one piece by Drake to the N. Y. and Erie Railroad Company, and the condition upon which it was conveyed was entire. A breach of it, therefore, gave the grantor or his heirs the right to re-enter and take the whole land. The land being a single parcel, the condition on which it was conveyed could not be apportioned by the grantor; and the reason given in the books, for this rule, is that a condition is "against common right." (1 *Greenl. Cruise on Real Property*, 511.)

Whenever the reversion is granted by the maker of the condition, the condition is gone. (*Hooper v. Cummings*, 45 *Maine Rep.* 359.)

I am constrained to hold that the conveyance by Drake to the Cayuga and Susquehanna Railroad Company destroyed the entire condition in his deed to the N. Y. and Erie Railroad Company; and my conclusion, therefore, is

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that the plaintiffs were properly nonsuited at the trial, and that their motion for a new trial should be denied, with costs.

So decided.

[BROOME GENERAL TERM, July 10, 1866. *Balcom, Mason and Parker*, Justices.]

BURDICK vs. WASHBURN.

The defendant, being the owner of a farm, entered into an agreement with the plaintiff, by which it was contemplated and intended that the latter should take and cultivate such farm, and receive and maintain upon it certain live stock, for their joint and mutual profit and advantage. As his share of the joint adventure, the defendant furnished the farm, the live stock, and certain parts of the seed grain and grass seed, and the plaintiff was to supply the residue and perform the labor, and devote the care required for carrying on the farm, and providing for and taking care of the stock and its increase; to deliver to the defendant one half of all the products of the farm; and to leave upon the farm, at the expiration of his term, the same amount of live stock he received from the owner; but there was no express provision made as to the hay which should be raised on the farm.

Held that the enterprise, though not a partnership, was in the nature of one; the leading object being to place the plaintiff in a situation where he could work the farm on shares, and to secure the joint benefit and profit of the parties. That the plaintiff therefore had the right to feed out the hay, on the farm, to the stock specified in the agreement to be kept on the farm; and if there was any excess of hay remaining, after he had performed all his obligations under the agreement, it belonged to him, and not to the defendant.

And the plaintiff having been, before the expiration of the term, dispossessed by the defendant, on the alleged ground that the former was, in violation of the agreement, feeding his own horses on hay cut upon the farm; *Held* that the defendant was liable to the plaintiff for the value of the excess of hay beyond what was required to feed the stock mentioned in the agreement.

THIS action was originally brought in a justice's court, in the county of Allegany, and upon the trial before the justice the plaintiff recovered a judgment exceeding the sum of fifty dollars. The defendant appealed to the

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county court, where a new trial was had, and the plaintiff was nonsuited. A motion was made for a new trial, in that court, upon exceptions taken at the trial, which motion was denied, and from the order denying the motion, the plaintiff appealed to this court.

Hakes & Stevens, for the appellant.

W. M. Hawley, for the respondent.

By the Court, DANIELS, J. The plaintiff claimed, upon the trial of this action, that he was entitled to recover the value of a quantity of hay, which it was alleged that the defendant had converted to his own use. The hay had been cut by the plaintiff upon a farm which the defendant owned, and had let to the plaintiff, by an agreement dated on the 14th of July, 1862. By the terms of the agreement the plaintiff was to have the farm, except the house and garden, together with four cows, two yearling heifers and two steer calves, until the 1st of April, 1865, and to furnish the grass seed for seeding down the land broken up at the date of the agreement, and one half that was required to seed down such land as should be afterwards broken up. For which the plaintiff agreed to do all the work upon the farm, work it in a workmanlike manner, and trim the orchard. He also agreed to seed down the land required to be sown with grass seed, and furnish half the seed for that which should be broken up after the making of the agreement, and half the seed grain, and to deliver one half the grain, potatoes, &c. in the half bushel, and one half the butter, cheese, &c., together with one half the growth of the stock, to the defendant. The plaintiff was to have his firewood from the farm, and one half the apples and cider.

The plaintiff had possession of the farm, and carried it on, under the agreement, until the 7th of January, 1863,

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when the defendant entered upon it and turned him out of possession. Previous to that time the defendant had fed his team from the hay cut upon the farm, which the defendant claimed was in violation of the agreement, and on that account he dispossessed him. The hay in question remained upon the farm, and was afterwards consumed by the stock placed upon it under the agreement, and a span of horses belonging to the defendant. By the terms of the agreement the defendant was entitled to have one cow and one horse kept upon the premises. This use of the hay the county court held to be justified by the agreement, and therefore nonsuited the plaintiff.

No express provision is contained in the agreement, relating to the hay that should be raised upon the farm, or indicating what should be done with it by the plaintiff. Whatever his obligations were in that respect must be determined constructively or inferentially from the subject matter to which it related, and the provisions contained in it. And to reach such determination, the circumstances should be considered under which the parties made and entered into the agreement. This is a well settled and familiar rule. (*Springsteen v. Samson*, 32 *N. Y. Rep.* 703.)

At that time they contemplated and intended that the plaintiff should take and cultivate the defendant's farm, and receive and maintain upon it certain live stock, for their joint and mutual profit and advantage. As his share of the joint adventure, the defendant furnished the farm, the live stock, and certain parts of the seed grain and grass seed. While, as an equivalent for that, the plaintiff was to furnish and supply the residue, and perform the labor and devote the care required for the purpose of carrying on the farm, providing for and taking care of the stock and its increase, in a workmanlike manner, and to leave upon the farm, at the expiration of his term, the same amount of live stock he received from the defend-

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ant. The enterprise, though not a partnership, was in the nature of one. The object was to secure the joint benefit and profit of the parties, each contributing certain means to the production of that result.

The leading object was to place the plaintiff in a situation where he could work the farm on shares. And the stock was placed upon it to enable him to secure the increase and make the butter and cheese, which were to be divided equally between himself and the defendant. The stock was to be sustained upon and by the farm, which could only be done by feeding to it the hay raised upon the farm, so far as that was necessary for that purpose. If, instead of the hay being produced from the farm, the parties had mutually agreed to supply it by joint purchase, for the same purpose, there would be no question made but that they would own it as tenants in common. And there can be no legal or substantial difference between the effect of such a purchase and the production of it in the manner contemplated by this agreement, for it resulted from the joint means of the plaintiff and defendant; one contributing the land, and the other the labor that produced it. Instead of delivering one half the hay directly to the defendant, as the plaintiff covenanted respecting the grain, potatoes, apples, cider, and increase of the stock, he undertook to deliver to him one half the result of it in the form of the butter and cheese that should be produced by it, which was only another form of giving the defendant one half the hay required to keep the stock. In that manner he would have the benefit from it, just as much, and probably more so, than he would if one half the hay had been delivered over to him. The plaintiff covenanted to work the farm in a workmanlike manner, which could only be performed, in this respect, by feeding the stock he was to keep upon it, with the hay produced by it. Under this view of the agreement, the defendant's interest in the hay was the same, in effect,

though not as direct as that which it secured to him in the grain, apples and cider; and such interest, it is well settled, was that of a tenant in common with the plaintiff. (*Jackson v. Brownell*, 1 John. 267. *De Mott v. Hagerman*, 8 Cowen, 220. *Caswell v. Districh*, 15 Wend. 379. *Putnam v. Wise*, 1 Hill, 234. *Tripp v. Riley*, 15 Barb. 333. *Dinehart v. Wilson*, Id. 595.)

When the defendant took possession of the hay in question, therefore, he did not convert the property, so as to authorize the plaintiff to maintain trover for it, even though the plaintiff had not forfeited his rights under the contract by feeding his own horses upon the hay raised from the farm; for nothing less than the destruction or sale of the joint property will constitute a conversion by a tenant in common or joint tenant. And as the hay was mostly devoted to the same purposes, by the defendant, which the plaintiff had covenanted to devote it to, by the agreement—that of feeding and maintaining the live stock placed upon the farm—he was not chargeable with a conversion in that appropriation of it; for changing the form of a chattel, by one joint owner, by converting it to its ultimately intended and profitable use, is not wrongful in judgment of law. (2 *Hilliard on Torts*, 425–8. 2 *Greenl. on Ev.* § 646. *Fleming v. Greenville*, 1 Taunt. 241.)

But the defendant kept one horse upon the hay, besides the horse and cow he was entitled, under the contract, to have maintained upon the farm. *By the terms* of the contract there was no disposition either expressly or impliedly made of the hay that might remain, after the stock placed upon the farm, together with the defendant's horse and cow, had been fed upon it, so far as they required it. The excess, if any remained after the plaintiff had performed all the obligations in that respect resting upon him, would vest in and belong to the plaintiff. That there was such an excess may be fairly and reasonably inferred from the circumstance that the defendant was able to feed one

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horse upon it, in addition to the stock, horse and cow, the plaintiff was bound to maintain with it; and for that excess, whatever it might be proven to be worth, the plaintiff should have been allowed to recover, by the county court. To that extent, and to that only, the defendant became liable to the plaintiff, in the form of action adopted in this case; and to enable the plaintiff to maintain the action to that extent, the order should be reversed, and a new trial directed.

[ENIG GENERAL TERM, May 7, 1866. *Grover, Daniels, Marvin and Davis*, Justices.]

GREGG & SAGE vs. BIRDSALL.

By the terms of an exception and reservation in a conveyance of land, "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now (then) covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," were excepted and reserved to the grantor. *Held* that such exception and reservation, being absolute in terms, and unlimited as to the period when the act of removal and manufacture should be exercised, if any time could be fixed by the act of the grantee, or of a judicial tribunal, within which the power of removal and manufacture was to be exercised, it should be in the *future*, upon notice to be given to the grantor, to exercise his power of removal within some time to be named; so as to enable him to obtain the benefit of his reservation.

Held, also, that he could not be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture had already elapsed, and therefore his rights were extinguished.

And that so long as the grantor had timber, which he might remove, he had also the right to overflow the lands for such reasonable time as might be necessary for the manufacture of the timber, after removal; which right was not extinguished by delay in its exercise.

THIS was an action in equity, brought to restrain the defendant from the further exercise of certain exceptions and reservations contained in a deed from the de-

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fendant to one Heminover, under whom the plaintiffs claim; for a construction of those exceptions and reservations; and for a decree declaring them canceled and extinguished.

The complaint sets forth that the defendant, in 1856, conveyed to one Heminover a tract of land, excepting and reserving "all the pine and hemlock suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands."

The plaintiffs are the grantees of Heminover, and they set forth that prior to the commencement of this action, the defendant had cut and removed from said premises all the pine and hemlock timber thereon, reserved by him in his said deed, that was suitable for sawing at the time of making such reservation. They further allege that he has cut timber not suitable for sawing, and claims the growth of the timber, and the right to overflow the premises covered by the mill pond, until the pine and hemlock are manufactured. Also that the term "adjacent lands" means only those lands conveyed by Heminover; and that previous to the commencement of the suit they forbade his cutting any more timber on the premises. They aver that he has no further rights there, to cut timber or to overflow, and ask for a judgment prohibiting him from cutting any more, and from overflowing on the premises, and to have the reservation canceled. No damages were claimed, and the action was, therefore, for the *specific relief* demanded.

The defendant, by his answer, denied all the equities of the complaint, also the plaintiffs' title, and most of the other allegations, except the execution of a conveyance to Heminover, which was admitted; and claimed specifically that there was at the commencement of the suit, and is, a large quantity of hemlock and pine timber on the premises,

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which was reserved in the deed. He also averred that the term "adjacent lands," used in the deed, was understood by the parties, and meant those lands owned by him, the grantor, and conveyed to Heminover, but alleged that the term "adjacent lands" was used in its ordinary sense.

The plaintiffs therefore claimed the interposition of the equity powers of the court:

1. To have the alleged cloud upon the title removed.
2. To have the defendant restrained from cutting and removing any further timber from the premises.
3. To have the defendant restrained from overflowing the lands in question, in the process of manufacturing the timber cut and removed from this and adjacent lands.
4. To have a construction of the words of reservation.

The referee to whom the case was referred for hearing and decision, among other things, decided that the exceptions and reservations in question were made; that the defendant had been in the full enjoyment of the premises and reservations, and might, with proper and reasonable effort and industry, have availed himself of all the benefits and advantages secured, or intended to be secured, by the reservations. He further found that there was still a large number of pine and hemlock trees standing on the premises, sufficient to make from 40,000 to 50,000 feet of lumber, which was suitable for sawing at the time of the conveyance from the defendant to Heminover; and that he had also cut and removed a large quantity of pine and hemlock timber not suitable for sawing, at the time of such conveyance; and he adjudged, among other things, that all the exceptions and reservations should be removed, canceled and terminated, except the right to cut and remove such pine and hemlock timber still remaining on the premises, as was suitable for sawing at the time the deed was executed; and directed a perpetual injunction against overflowing any part of the premises by the waters of the mill pond, and the removal of the water from said

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lands; and that the plaintiffs recover of the defendant their costs.

The defendant duly excepted, and judgment having been perfected, appealed to this court.

A. J. Parker, for the appellant.

W. J. Gros, for the respondent.

By the Court, HOGEBROOM, J. By the judgment pronounced in this case, taken in connection with the referee's report, it appears that at the commencement of the action there was still upon the premises in question a large number of pine and hemlock trees suitable for sawing at the time of the conveyance to Heminover, and which, under the exception and reservation in the conveyance to him, belonged to the defendant. By the terms of this exception and reservation "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now (then) covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," were excepted and reserved to the defendant. This exception and reservation was absolute in terms, and unlimited as to the period when the act of removal and manufacture should be exercised. I do not see why the property in the excepted timber would not forever remain in the defendant, and those who derived title through him, and if any time could be fixed by the act of the adverse party, or of a judicial tribunal, within which the power of removal and manufacture was to be exercised, (which I think doubtful,) it should be in the *future*. Notice should be given to the defendant to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation; and he should not be deprived of his property or reserved rights by an allegation that a

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reasonable time for removal and manufacture had already elapsed, and therefore his rights were extinguished, and this without notice that the plaintiffs wished him to remove his property from their premises. The only notice they gave him was one in effect, that his rights were already terminated, and that he must remove no more timber. The referee has decided that while there was still timber on the land which the defendant owned and had a right to remove, he had no right to manufacture it by overflowing the lands covered by the adjacent mill pond, for ever so short a time after such removal. The right to manufacture (and overflow for such purpose) was coextensive with the right to remove; and it seems to me clear that so long as the defendant has timber, which he may remove, he has also the right to overflow the lands in question, for such reasonable time as may be necessary for such manufacture, after such removal. This right the referee has cut off by declaring it canceled and terminated, and forbidding the further exercise; and I think improperly. This right is not extinguished by delay in its exercise. The parties have not seen fit to impose any limitation of time, in the conveyance, in regard to the exercise or enjoyment of these privileges; and if any limitation can now be interposed, I think it cannot, in equity, be done without allowing a reasonable time, in the future, for their exercise.

As this is decisive of the case, and necessarily leads to a reversal of the judgment, it is superfluous to consider any of the other questions in the case.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

[ALBANY GENERAL TERM, September 15, 1886. *Miller, Ingalls and Hogeboom, Justices.*]

PEARSON vs. LOVEJOY.

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An order of a county court, dismissing an appeal from a justice's judgment, on the ground that it was not brought in time, is a final determination of the rights of the parties, in the action, and is therefore to be deemed a judgment, within the meaning of section 245 of the Code.

Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored.

The personal notice of a judgment, required by section 858 of the Code, in order to limit the time to appeal, means a personal notice in writing from the party who has obtained the judgment, and not a notice incidentally derived from a third person, or in some other way.

The statute must be held to give the right of appeal at any time within twenty days after the party shall receive written notice from the party recovering the judgment.

The rule is well settled that, where a notice is required or authorized by statute, in legal proceedings, it means written notice.

A general appearance by the respondent, in the appellate court, and noticing the appeal for argument, are positive acts of submission to that court, and amount to a waiver of the right to have the appeal dismissed on the ground that it was not made in time.

A PPEAL from a judgment entered July 29th, 1863, upon an order of the Otsego county court, made in September, 1857, dismissing the defendant's appeal from a judgment rendered against him in a justice's court, on the ground that the time to appeal had expired.

The action was commenced by attachment, before the justice, and a judgment was rendered for the plaintiff on the 19th of January, 1852. The process was not personally served, and the defendant did not appear. The notice of appeal was not served by the defendant until July 17, 1856, and the justice made and filed his return thereto in August of the same year. On the 14th of February, 1857, the plaintiff, by his attorney, served upon the appellant's attorney notice of appearance on the appeal. In May, 1857, the respondent's attorney noticed the appeal for argument for the May term of the county court, and at the same time served a copy of an affidavit made by one

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Brown, stating that in March or April, 1854, the appellant said that he knew of the judgment; and in August of the same year, (1857,) he again noticed the appeal for argument upon the return and said affidavit, for the August term of that court. At that time the appeal was moved on for argument, by both parties, and the same was heard on the return, affidavit of Brown, and proof of service of the notice of appearance, and of the above mentioned notice of argument.

In September, 1857, the county court made an order dismissing the appeal, with \$10 costs, on the ground that the appellant's knowledge of the judgment, in March or April, 1854, was equivalent to personal notice of it, and that he had lost the right to review the judgment by delaying to appeal from it within twenty days from that time. A judgment was entered, in pursuance of such decision, dismissing the appeal, and the roll filed on the 29th of July, 1863. The defendant appealed to this court on the 26th day of July, 1865.

James E. Davey, for the appellant.

De Witt C. Bates, for the respondent.

By the Court, MASON, J. The first question to be considered in this case is, whether the order of the county court, dismissing the appeal from the judgment of the justice, is to be deemed a judgment, within the meaning of section 245 of the Code. That section defines a judgment to be the final determination of the rights of the parties in the action. It seems to me that, so far as the county court is concerned, it must be regarded as a judgment. The appeal was dismissed on the ground that it was not brought in time. If it appears from the return itself that it was brought in time, and the county court has decided that it was not, and given judgment dismiss-

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ing the appeal for that reason, it must be regarded as the final determination of the rights of the parties; for there is no redress left to the appellant, and the action in fact is decided in favor of the plaintiff. The principle enunciated in the following cases would seem to hold that this order, and the judgment entered thereon, must be regarded as a judgment within the spirit and meaning of the 245th section of the Code. (*Talbot v. Talbot*, 23 *N. Y. Rep.* 17. 6 *Hill*, 157. 4 *Wend.* 483. 4 *How. Pr. R.* 195. 3 *N. Y. Rep.* 546. 7 *How. Pr. R.* 194. 12 *John.* 31.) It is said in the latter case, whether the decision is denominated a judgment, an order, a decree or sentence, is very immaterial. The decision is in effect a final judgment by which the suit is terminated, and the subject in controversy is awarded to one party, against the other. It would seem from the judgment order dismissing the appeal, that the whole case was brought before the court, and the return itself read, and the cause was moved on, as well upon the notice of argument as upon the notice of motion to dismiss the appeal, and was thus submitted to the court; and when the decision came, it was a dismissal of the appeal, upon the ground that the appellant was too late in serving his notice of appeal.

The next and more difficult question in the case is, was the appeal brought in time? This question depends upon the construction which is to be put upon section 353 of the Code. That section, regulating appeals from judgments in justices' courts, provides that if the judgment, as in this case, is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days after personal service of the judgment, to serve the notice of appeal, &c. (*Code*, § 353.) It appears from the return of the justice, that the judgment was entered on the 19th of January, 1852. The notice of appeal was not served until July 17th, 1856; and the only evidence that the appellant had personal notice of the judgment

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more than twenty days before the notice of appeal was served, is to be found in the affidavit of Joseph R. Brown, and upon which the notice to dismiss was predicated. He swears, in that affidavit, that in March or April, 1854, he heard the defendant, Lovejoy, say that he knew of the judgment in this action, which was entered before Abram I. Brown, Esq. It is claimed on the part of the plaintiff, in this case, that the admission made to Brown proves that he had personal notice of the judgment. Whether he was informed of it by the plaintiff, by the justice, by a stranger, or how he got his information of the existence of the judgment, we are not informed. This, in my judgment, utterly fails to prove that he had personal notice of the judgment, within the meaning and intent of this 353d section of the Code.

Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored. (4 *Barb.* 636. 1 *Wend.* 395.) The language of the statute is quite plain: "He shall have twenty days after personal notice of the judgment." This does not mean twenty days after he shall ascertain by his own inquiries or investigation, that such judgment exists against him, but twenty days after he shall receive personal notice of the judgment from the party himself in whose favor the judgment was entered. This, I have no doubt, was the intention of the framers of this statute. The legislature never were guilty of the absurdity of limiting the important right of appeal in such cases as this, where there has been no personal service of process upon the party, to twenty days after he might be informed, by some means or somehow, and perhaps by a stranger, of the existence of the judgment.

The only reasonable construction which can be put upon this statute is to hold that personal notice means a personal notice from the party who has obtained the

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judgment. It was said by the court, in *Gilbert v. The Columbia Turnpike Company*, (3 *John. Cas.* 107,) that a notice, in legal proceedings, means a written notice. The same is affirmed by BROWN, J., in *Miner v. Clark*, (15 *Wend.* 429.) The same is again affirmed in *Lane v. Cary*, (19 *Barb.* 539.) The rule is well settled, that where a notice is required or authorized by statute, in any legal proceedings, it means written notice. (*See, in addition to the cases above cited*, 15 *John.* 533; 5 *Hill*, 104; 6 *Abb.* 56; 26 *Barb.* 248.) This statute must be held to give the right of appeal at any time within twenty days after the party shall receive written notice from the party in whose favor the judgment was obtained. Any other construction would leave the time of appealing in the greatest doubt and uncertainty.

I am of the opinion, for these reasons, as well as for the reason that the plaintiff had waived his right to have the appeal dismissed, by his general appearance on the appeal, and by noticing the appeal for argument at the May and August terms, that the county court was wrong in dismissing the appeal. They were positive acts of submission to the tribunal whose right to hear the appeal his motion to dismiss questioned. (6 *Wend.* 550. 2 *N. Y. Rep.* 467. 7 *How. Pr.* 111. 27 *id.* 335. 12 *John.* 204. 10 *Paige*, 615, 616.)

The judgment of the county court should be reversed, and that court directed to hear the appeal.

[BROOME GENERAL TERM, November 20, 1866. *Parker, Mason, Balcom* and *Boardman*, Justices.]

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THE PEOPLE OF THE STATE OF NEW YORK vs. THE CENTRAL CITY BANK.

Where it is claimed that an order to show cause is invalid, because not shown to have been made at a regularly adjourned special term, it will not be *presumed* that it was made at a term irregularly held.

When a court has been regularly convened, it continues open till actually adjourned. An order for its continuance is not essential; and an order made by the court that it shall so continue need not be entered with the clerk. If necessary to be entered, it is the duty of the clerk to enter it; or if accidentally omitted, it may be entered by him *nunc pro tunc*, and would even be ordered to be entered on appeal, to sustain proceedings had under it otherwise regular.

It is the clerk's duty to enter orders of the court, without any special directions to that effect; and his delay or omission to make actual and speedy entry of orders in the minutes will not be allowed to prejudice the substantial rights of parties.

An order for a bank to show cause why its business should not be closed, and a receiver appointed, is properly served upon its vice president; especially where it appears that he is also a director.

Where two receivers of an insolvent bank were appointed, on the same day, by different justices, both of which receivers claimed the assets of the bank, and one was in actual possession thereof; *Held* that it being a question of legal priority which the court was bound to settle, it would inquire into the fractions of the day on which the two receivers were appointed.

The mere preparation and verification of the papers on applications for the appointment of receivers cannot determine the question of priority.

Where two applications were made by different parties, on the same day, before different justices and in different districts, for the appointment of a receiver of a bank; *Held* that the party who obtained the first judicial action; the first service of papers; the first granting of the order for the appointment of a receiver; and the first perfecting of the appointment, by the execution, approval and filing of the required bond, took precedence of the other party, whose receiver merely first took actual possession of the assets of the bank.

The provisions of the Revised Statutes, entitled, "Of proceedings against corporations, in equity," (2 R. S. 461,) are not repealed or abolished by the act of 1849, "to enforce the responsibility of stockholders in certain banking corporations," &c. (*Laws of 1849, chap. 226.*)

Hence, proceedings may still be instituted, under the Revised Statutes, by the people, through their attorney-general, for the dissolution of a moneyed corporation, and the appointment of a receiver to wind up its affairs. This valuable right was not intended to be in any wise impaired by the act of 1849. So far as this question is concerned, the statutes do not necessarily conflict.

The People v. The Central City Bank.

Where two receivers are appointed, of the same bank, under distinct and independent proceedings, and by the terms of their respective appointments each has entire control of all the assets of the bank, they cannot with propriety both act; the title of the one is necessarily exclusive of that of the other, and the question of priority must be determined as a legal right.

APPEAL by the plaintiffs from an order made at a special term, refusing an attachment and other relief.

J. H. Martindale, (attorney general,) for the appellants.

Daniel Pratt and *Lyman Tremain*, for the respondents.

HOGEBROOM, J. The plaintiffs moved at a special term in the third district (where the venue was laid) for an order against Charles B. Sedgwick, Esq., of Syracuse, to show cause why the custody of the assets of said bank was withheld from L. Harris Hiscock, the receiver appointed therein by Justice Peckham; why an attachment should not issue against him, the said Sedgwick; why he should not be punished for his alleged misconduct; and why the order (of Justice Foster) appointing him, the said Sedgwick, receiver, should not be vacated.

The motion is made upon all the papers in the case, and it is necessary to look into most of them to determine the merits of the application. The Central City Bank suspended payment on Saturday, the 29th day of December, 1866. Upon a petition of the attorney general, accompanying papers stating that fact and the insolvency of the bank, verified on the 31st day of December, 1866, Justice Peckham, at a special term, granted an order for the defendant to show cause on that day, at 11 o'clock A. M., why the business of said corporation should not be closed and a receiver appointed. This order, together with the summons and complaint, were personally served upon Hon. LeRoy Morgan, the vice president and a direc-

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tor of said bank, on said 31st day of December, at about 10½ o'clock A. M. At the time appointed for showing cause, the plaintiffs appeared, by counsel, and the defendant did not appear. An order was thereupon granted, at special term, by Justice Peckham, that the said Central City Bank be and the same was thereby dissolved, and restraining the bank and its officers from exercising any of its corporate functions, and from receiving or disposing of any of its effects except to the receiver, and appointing L. Harris Hiscock, on filing a proper bond duly approved, (describing the same,) receiver of the bank, with the usual powers in closing up the affairs of the bank and making a final settlement of the same. This order was filed with the clerk at about 11.35 A. M. of the 31st of December, and on the same day, at about the same hour, the required bond was duly approved, and filed with the clerk. Mr. Hiscock, learning that Mr. Sedgwick was in possession of the assets of the bank, called upon him, on the 3d day of January, 1867, exhibiting to him the order appointing him receiver, and demanded of him possession of said assets, with which demand said Sedgwick refused to comply. Thereupon the proceedings before referred to were instituted, to compel such compliance and to punish him for contempt, which resulted in the order made at special term, from which this appeal is taken.

The ground upon which said Sedgwick refused compliance with said order, and declined to deliver said assets, was, that, as he claimed, he himself was the lawful receiver of the bank, and entitled to hold and administer its assets. On the 29th day of December, 1866, (the day on which the bank suspended payment,) George Barnes, the cashier of the institution, instituted proceedings, under the act of 1849, to obtain an injunction against the bank and the appointment of a receiver; that is, he employed counsel and verified a petition, on that day, for

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such purpose. Upon this petition Justice Foster, on the 31st day of December, 1866, at chambers, and as early as 11 o'clock of that day, granted an order that said bank, on the same day, at 4 o'clock P. M., show cause why it should not be declared insolvent, and why an injunction should not issue and a receiver be appointed. These papers were, soon thereafter, duly served upon Oliver F. Burt, the president of the bank, (as by said order required,) on said 31st day of December. At the time appointed, the parties appeared, and Justice Foster, at chambers, made an order declaring the bank insolvent, awarding an injunction against the further exercise of its functions, and appointing the said Charles B. Sedgwick receiver of the bank, on his executing and filing with the clerk a bond, with sureties, duly approved, (as specified in said order.) On the same day the requisite bond, duly approved, was executed and filed with the clerk of Onondaga; and thereupon, also on the same day, said Sedgwick, as such receiver, demanded and received from Oliver F. Burt, the president, possession of the property and assets of the institution, which he still retains.

The proceedings under which the respective parties acted in obtaining the appointment of their respective receivers, considered without reference to each other or to the validity of the statute under which they were respectively had, appear to have been regular, or at least not invalid. Some objections, partly of a technical character, are taken by the defendant against the plaintiffs' proceedings, on the question of regularity, but I think they have not sufficient foundation to invalidate the proceedings. Thus, in regard to the orders made by Justice Peckham, first, the order to show cause; and second, the order appointing a receiver, it is said they are invalid, because not shown to have been made at a regularly adjourned special term, and not to have been actually entered by the clerk. As to the first objection, I think the an-

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swer is, it will not be *presumed* that they were made at a term irregularly held. There is nothing to show that the special term in question was not the continuance of a term regularly held by the justice, and held open by him for the transaction of further business, at his chambers or elsewhere. The court having been regularly convened, continues open till actually adjourned. An order for its continuance is not essential; and an order made by the court, that it should so continue, is not necessary to be entered with the clerk. If it is so, I think when actually made by the court, (which is the act which gives it validity,) it is the duty of the clerk to enter it; or, if accidentally omitted, it may be entered by him *nunc pro tunc*, and would even now, if necessary, be ordered to be entered, to sustain proceedings had under it, otherwise regular. If Justice Peckham's special term was of this character, as we may presume, there is nothing to impeach their validity in the respect just specified. As to the second objection, that the orders were not entered by the clerk, I have just said they were the orders of the court, approved by the seal of the justice, and *must* be entered. If not entered immediately, as is of course more appropriate, they may be entered afterwards. It is the clerk's duty to enter them, without any special directions to that effect, and they may be entered *nunc pro tunc* when accidentally omitted, and when necessary to sustain proceedings had in good faith, and otherwise unexceptionable. The delay or omission of a clerk to make actual and speedy entry of the order in the minutes, cannot be allowed to prejudice the substantial rights of parties.

Again, it is said that the order to show cause was not properly served, and that no proper evidence of service was furnished to the court or incorporated in the order. The order was served on the vice president, and I think he was a proper person on whom to serve. It now appears that he was also a director, and I rather think that

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would be presumed from his office of vice president. Although the evidence of such service is not recited in the order appointing the receiver, I think we may presume that the evidence of it was presented to the court before it allowed them to take the order on the non-appearance of the defendant, which was directed to be served on the defendant.

It is supposed that as both of these receivers were appointed on the same day, and Sedgwick has possession of the assets, the court will not inquire into the fractions of a day, to displace his possession. But it is a question of actual priority, which, I think, we are bound to settle, and that where parties stand upon their legal rights, in a matter in which, in themselves considered, both are unexceptionable men, if we can fairly determine the question of legal priority, the ends of justice require that it should be carried into execution.

These preliminaries disposed of, two questions remain : 1. Were the Revised Statutes in operation, so as to justify the proceedings taken by the attorney general ? 2. If so, which party had the legal priority of right to the possession of the assets ?

We will consider the latter question first.

Although the petition for the appointment of a receiver was first prepared and verified in the case pending before Justice Foster, yet the first judicial action was taken in the case pending before Justice Peckham, both, however, being on the same day. The precise hour does not appear, further than that Judge Peckham's order was served about half an hour before Judge Foster's order was granted.

All the subsequent judicial proceedings necessary to perfect the appointment of a receiver, had before Justice Peckham, preceded those before Justice Foster. Justice Peckham's order to show cause was returnable at 11 A. M., and his order for the appointment of a receiver, as granted, was filed with the clerk about 11.35 A. M., together with

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the bond of the receiver, duly executed and approved. Justice Foster's order to show cause was not returnable till 4 o'clock P. M., and it was at or after that hour that it was made, the bond filed, and the appointment of Mr. Sedgwick perfected. On the *same* day, Sedgwick obtained possession of the assets. The mere preparation and verification of the papers cannot determine the question of priority; and whether it be determined by the question of first judicial action, of first service of papers, of the first granting of the order for the appointment of the receiver, or the first perfecting of the appointment, by the execution, approval and filing of the required bond, the proceedings had before Justice Peckham take precedence. One of these latter questions must, I think, determine it; for the mere fact that Sedgwick first obtained the actual possession of the assets cannot settle the question of legal right.

The defendants claim that the provisions of the Revised Statutes, entitled "Of proceedings against corporations in equity," (2 R. S. 464, 465,) under which the plaintiffs evidently proceeded in this case, are abolished by chapter 226 of the Laws of 1849, (p. 340,) under which the proceedings were instituted which resulted in the appointment of Mr. Sedgwick. There is no express repeal; and if there be any repeal, it must be a repeal by implication, resulting from the inconsistency of the two statutes, or from the evident intent of the legislature to substitute the latter proceedings in the place of the former. The first four sections relate to the liability of stockholders, and have no connection with this subject. Sections 5 and 6 provide for the speedy enforcement of claims against the bank by suit, judgment and execution, and, on the return of an execution unsatisfied, for an order declaring the insolvency of the corporation. Sections 7, 8 and 9 provide for an application for an order of the same kind by a creditor having a demand exceeding \$100, after the lapse

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of ten days after demand of payment of such claim and refusal to pay, and for a temporary injunction, and also, ultimately, after a hearing, for an injunction restraining the exercise of its corporate rights, and for a receiver. Section 10 (under which the defendant's proceedings were taken) provides for an application for an order declaring the corporation insolvent, or in imminent danger of insolvency, by any one or more stockholders, to the amount of one-tenth of the capital of the bank, and also for a temporary and final injunction and a receiver, as specified in section 9. Section 12 defines the powers and duties of the receiver, and all the subsequent sections of the act appear only to contain provisions for the speedy and effectual execution of his trust, and for the prevention of delays in the enforcement of demands against corporations.

This act, it is plain, does not cover a large number of cases in which courts of equity have exercised jurisdiction over corporations, many of which are recited in the title of the Revised Statutes heretofore quoted, and among others, several of the cases specified in sections 39, 40 and 41 of that title, (2 *R. S.* 464,) by which, in the event of the insolvency of a corporation, its violation of any of the provisions of its act of incorporation, or of any other act binding on such corporation, a court of equity may, *upon the application of the attorney general, in behalf of the state*, issue an injunction restraining the corporation from the exercise of its corporate powers, and from the collection of its debts, and from the disposition of its property, and may also, *in any stage of the proceedings, appoint one or more receivers* to take charge of the property and effects of such corporation.

I think it could not have been intended by the act of 1849 to repeal these provisions of the Revised Statutes, so far as respects the people of the state. The act of 1849 does not provide for them, otherwise than as they might happen to be *creditors* of the corporation. It is emphatically the right of the people, in their sovereign capacity,

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to enforce strict observance of the obligations imposed by law and by their charters, not the least important of which is the obligation to pay their debts on demand, and on default of such observance, to institute proceedings through their attorney general, for the dissolution of the corporation and the appointment of a receiver to wind up its affairs. I cannot believe this valuable right was intended to be in any wise impaired by the act of 1849. So far as this question is concerned, they do not necessarily conflict, and may well stand together. The convention of judges of the first and second districts, which met in October, 1857, under peculiar circumstances, and under the pressure of a very just and laudable desire to sustain the banks in the pecuniary crisis of that period, pronounced no opinion inconsistent with the maintenance of this action.

They say: "In all cases in which the act of 1849 is applicable, it is deemed to supersede the provisions of the Revised Statutes." (*Livingston v. The Bank of New York*, 5 Abb. 343.) The language is guarded, and I think leaves the Revised Statutes to operate, in a case like the present. Nor does Justice ALLEN, in the case of *Ferry v. The Bank of Central New York*, (15 How. 450,) decide the question adversely to the views now presented. On the contrary, he says: "I am aware that the policy of the law does not favor the repeal of statutes by implication, and that, ordinarily, there must be a clear repugnance between the two statutes, before the latter will be held to operate as a repeal of the former; in the absence of a repeal in terms, and that courts hold against the repeal when both can stand together. *These two statutes cannot be said to be so repugnant to each other that they cannot, in many things, stand together.*" * * "The question is one of too much importance to be hastily decided at special term, unless necessary to the determination of a pending matter; and as I do not deem it essential to pass upon it upon this motion, I will not further consider it." It will be noted

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that the case of *Ferry* was the case of a *stockholder* of the bank, and was not, therefore, like the present case.

As the result of these considerations, I think that the order of the special term, which continues the injunction, should be *reversed*.

Something is said, in the papers, about the comparative fitness of these two persons for the office of receiver; their comparative leisure for that purpose; and the comparative extent in which they represent the wishes of a majority of the stockholders. But I discover no reason for any just criticism upon either of them as to their personal fitness or business capacity. If any objection really exists, on that score, there can be no reason why an application for his removal, and having that object directly in view, may not be hereafter made.

It is further said that it is inadmissible in this collateral way to attack the proceedings before Justice Foster. We do not propose to take any jurisdiction of those proceedings; but pending before us, in an application originating in this district, a question as to the validity of the appointment of a receiver, and as to the priority of his title to the assets of the bank, compared with that of a receiver appointed elsewhere, we cannot decline to decide the question necessarily involved. Nor should Mr. Sedgwick be punished for contumacy, or for a disobedience of the order of the court. He appears to have acted in good faith, and had the authority of an order of the court, which he was probably entitled to regard as valid, until pronounced otherwise, on the question of priority, by a competent tribunal. That decision being now pronounced, it will be his duty to obey it and deliver over the assets to Mr. Hiscock, the receiver first appointed. I see no other course to pursue. These receivers cannot with propriety both act. They are appointed under distinct and independent proceedings, and by the terms of their appointment each has entire control of all the assets of the bank. The title

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of the one is necessarily exclusive of that of the other, and the question of priority must be determined as a legal right.

I think the proper order to be entered is, that the order of the special term be reversed; that L. Harris Hiscock be declared the lawful receiver of the property and assets of the Central City Bank, and entitled to their custody and possession; that Charles B. Sedgwick, Esq., deliver over the same, on demand, to said Hiscock, so far as they are in the possession or under the control of said Sedgwick; and that in the event of his neglect or refusal to do so, said Hiscock have leave to apply at a special term for the proper enforcement of this order.

MILLER, J., concurred.

PECKHAM, J., expressed no opinion.

Order reversed.

[ALBANY GENERAL TERM, March 4, 1867. *Peckham, Miller and Hogeboom*, Justices.]

53b	422
163a	65
163a	66

THE UNION BANK OF TROY *vs.* SARGEANT and LOWN.

Objections to the preliminary affidavit, in supplementary proceedings, cannot be raised on appeal from the order appointing a receiver, where there is nothing in the papers to show that such objections were made before the county judge, or that he made any decision relating to them. The proper course is to move to vacate the original order.

The objection that the execution appears to have been issued after the expiration of five years from the entry of the judgment, cannot be raised on such appeal. If the execution was improperly issued, the defendant should have applied to the court to set it aside for irregularity.

APPEAL by the defendant Lown, from an order of the county judge of Rensselaer county, appointing a receiver in proceedings supplementary to execution.

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The defendant raised various objections to the preliminary affidavit upon which the proceedings were originally founded, which he alleged were made before the county judge, where the motion for the appointment of a receiver was made, upon the report of the referee to whom it was referred to examine the defendants, but which did not appear to have been urged, by any of the papers upon which the appeal was heard.

C. H. Denio, for the appellant.

C. F. Tabor, for the respondent.

By the Court, MILLER, J. It may be questionable whether the defendant has not waived the right to object to the preliminary affidavit, by appearing before the referee and submitting to an examination. It has been held, in several cases, that such appearance is a waiver.

In *Viburt v. Frost*, (3 Abb. 120, 121,) DUNE, J. says: "If the original order for the debtor's appearance was a nullity, he was not bound to appear; nor was he bound, when he appeared, to submit to an examination. His appearance and submission to an examination must, therefore, be regarded, if the order for his appearance was null, as voluntary acts. And it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of a judgment debtor."

Bingham v. Disbrow (37 Barb. 24) holds the same doctrine, and cites approvingly, the case last above named. (See also 8 How. 315.)

Sackett v. Newton, (10 How. 560,) where it was held that the officer did not acquire jurisdiction, because the affidavit was insufficient, arose upon an appeal from an order appointing a receiver, as well as from the several orders prior thereto. The point was taken that the defendant had

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waived his right to object to the regularity of the proceedings, by appearing and submitting to an examination; but the question is not discussed in the opinion.

Passing by the point discussed, I am at a loss to see how the objections to the affidavit can be raised upon this appeal from the order appointing a receiver. There is nothing in the papers to show that the objections to the preliminary affidavit, now urged, were made before the county judge, or that he made any decision relating to them. I think the proper course would have been to have made a motion to vacate the original order. This was done in *Owen v. Dupignac*, (17 How. Pr. 512,) and I do not see how this question could properly be presented in any other way. This would bring the question up directly, so that a decision could be had and an order made which could be properly reviewed on appeal. And such seems to be the practice. (*Lindsay v. Sherman*, 5 How, 308. *Conway v. Hitchins*, 9 Barb. 378, 387. *Bank of Genesee v. Spencer*, 15 How. 14.)

If the objection made, that the execution appears to have been issued after the expiration of five years from the entry of the judgment, can be entertained here, I think it is not a valid one. If improperly issued, the defendant should have applied to the court to set it aside for irregularity. (*Sandford v. Sinclair*, 8 Paige, 373.) It may have been issued by the order of the court, for any thing which appears in the papers, or a prior one may have been issued within the five years, and returned unsatisfied; and I do not think that it was essential to show that either the one or the other of these contingencies had occurred on the application for the original order.

The second subdivision of section 392 of the Code provides that the same proceedings may be had as for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the

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return of an execution. This would authorize the appointment of a receiver, if necessary; and I think sufficient appeared from the defendant's examination to warrant the order made.

The order of the county judge must be affirmed, with \$10 costs of appeal; without prejudice to any application of the defendant to set aside the order first made, and subsequent proceedings.

[ALBANY GENERAL TERM, March 4, 1867. *Peckham, Miller and Hogeboom, Justices.*]

 MOORE vs. NOBLE.

In an action for a *deceit* in the sale of a horse, where the *fraud* is the gist of the action, if there is no evidence of a *scienter*, the action cannot be sustained.

Where the complaint averred that to induce the plaintiff to purchase, the defendant falsely and fraudulently represented the horse to be worth \$120, and guaranteed him to be sound in all respects, and free from disease; that he was not sound, and not worth \$120, but was unsound, and had a disease well known to the defendant, at the time of the sale; *Held*, that the complaint was for deceit in the sale, willfully and knowingly perpetrated by the defendant. And that these were substantive averments, on which the action was founded, and it was necessary for the plaintiff to prove them.

Held, also, that the defendant having expressly negatived any knowledge by him of the alleged unsoundness, and the plaintiff failing to prove such knowledge, the latter was not entitled to recover in an action for deceit.

The rule in a justice's court is the same as in all other courts — that if a material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed on appeal, whether the trial is with or without a jury.

ACTION to recover damages for a breach of warranty in the sale of a horse. It was brought before a justice of the peace in Jefferson county. The complaint was as follows: "That on or about the month of March, 1865, the said plaintiff, at the town of Hounsfield, purchased a

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certain horse of the defendant, for and at the agreed price of \$120, and paid the said defendant said sum ; that said defendant, to induce the plaintiff to purchase the said horse, falsely and fraudulently represented the said horse worth and of the value of \$120, and guarantied the said horse to be sound in all respects, and wholly free from disease ; that the said horse was not sound or free from disease, as represented by the defendant, nor was he worth or of the value of \$120, but the said horse was unsound and diseased, in this, to wit: the said horse was unsound and diseased in the shoulder, and had a disease of the shoulder called *sweeney*, which said disease was well known to the defendant at the time of the sale of the said horse to the plaintiff. Wherefore," &c.

The answer was a general denial.

The plaintiff claimed that the complaint set forth a cause of action for breach of warranty, and that it was unnecessary to prove the allegations of deceit. The action was tried before the justice and a jury. No *scienter* was proved on the trial. The jury found a verdict in favor of the plaintiff for \$30, and from the judgment rendered thereon the defendant appealed to the county court of Jefferson county, which court affirmed the judgment of the justice, and the defendant appealed to this court.

Reynolds & O'Brien, for the appellant.

Moore & McCartin, for the respondent.

By the Court, BACON, J. If the action, in this case, had been simply for a breach of warranty, it is possible the judgment might be upheld, although the evidence is far from being very satisfactory, either that an unsoundness existed at the time of the sale of the mare, or that the plaintiff relied upon, and bought upon, the faith of the alleged representations of the defendant. And in this

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respect it would be immaterial whether the defendant did or did not know of the unsoundness, prior to the sale; because upon an absolute warranty it is unnecessary to allege a *scienter*, and upon such a representation a party is bound to accountability for an unsoundness, whether he knew it or not. (*Case v. Boughton*, 11 *Wend.* 106.)

But in an action for a deceit in a sale, where the fraud is the gist of the action, the rule is otherwise. In such a case, if there is no evidence of a *scienter*, the action cannot be sustained. It may not be necessary, in all cases, to aver knowledge on the part of the defendant, of the falsity of the representations, and in the case of *Thomas v. Beebe* (25 *N. Y. Rep.* 244) it is held that an averment that the defendant "*falsely and fraudulently represented*," is a sufficient statement of the *scienter*. That the complaint in this case is for deceit in the sale, willfully and knowingly perpetrated by the defendant, is manifest. To give it any other construction would be to violate all the rules of language and of pleading. It avers that to induce the plaintiff to purchase, the defendant falsely and fraudulently represented the horse to be worth \$120, and guaranteed him to be sound in all respects, and free from disease; that he was not sound, and not worth \$120, but was unsound and had a disease well known to the defendant at the time of the sale. These are substantive averments on which the action is founded, and it was necessary to prove them; and the rule in a justice's court is the same as in all other courts, that if a material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed on appeal, whether the trial is with or without a jury. (*Tift v. Tift*, 4 *Denio*, 175.)

In this case there was an utter failure by the plaintiff to prove that the defendant had any knowledge of the alleged unsoundness, and the defendant expressly negatived any such knowledge. Without this proof the plaintiff was not entitled to recover, in the form of action he

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elected to bring, and the judgment should have been reversed.

MULLIN, J., dissenting, wrote an opinion for affirmance, maintaining the doctrine laid down in *Bennett v. Judson*, (21 N. Y. Rep. 238,) and *Craig v. Ward*, (36 Barb. 377.)

Judgment reversed.

[ONONDAGA GENERAL TERM, April 2, 1867. *Morgan, Bacon, Mullin and Foster*, Justices.]

GRIFFEN and others *vs.* BROWN & SMITH.

Where the plaintiffs established at the trial, and were allowed for, a valid and subsisting claim or account against the defendants of over \$400 and nearly \$500, and the defendants established a set-off or counter-claim of over \$400 and within five cents as much as the plaintiffs' demand; both demands being subsisting and independent demands, capable of being prosecuted for as such, affirmatively, and therefore matters of account, within the meaning of section 54 of the Code; *Held* that the plaintiffs, on recovering a judgment for five cents, were entitled to costs; it being a case wherein the Code (*sec. 304, sub. 3*) gives costs to the plaintiff upon a recovery (for any amount) in the actions in which a justice of the peace has no jurisdiction.

MOTION by the plaintiffs to set aside a judgment for costs in this case, entered in favor of the defendants, and to award costs to the plaintiffs, upon the report of a referee therein.

S. F. Higgins, for the plaintiffs.

H. Harris, for the defendants.

HOGEBROOM, J. The plaintiffs in this case sued to recover for lighterage and storage of grain for the defendants, about the sum of \$500, and the report of the referee

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established their claim, with interest, at nearly that amount.

The defendants, admitting the lighterage and storage of a large quantity of the grain, claimed in their answer that a considerable quantity of the grain was never returned to them, but was lost or wasted or converted by the plaintiffs, and claimed that the plaintiffs should account and pay for the quantity deficient; that such amount should be applied in payment and discharge of the plaintiffs' claim, and the defendants have judgment for the excess.

The referee allowed most of the defendants' claim; found that a certain portion of the grain that went into the defendants' possession was lost by shrinkage and waste; and that nearly 1000 bushels were unaccounted for; for which quantity the referee charged the plaintiffs at the market price, with interest, amounting *within five cents* to the amount of the plaintiffs' claim; for which sum of *five cents* the referee reported in favor of the plaintiffs. The defendants supposing themselves, under this state of facts, to be entitled to costs, taxed the same at over \$100 against the plaintiffs (the plaintiffs objecting thereto) and entered judgment therefor against the plaintiffs. The plaintiffs now moved to set aside the judgment for costs, and for an order adjudging that they are entitled to costs.

I think it quite clear that the plaintiffs are so entitled. They established, at the trial, and were allowed for, a valid and subsisting claim or account against the defendants, of over \$400 and nearly \$500; and the defendants established, to the satisfaction of the referee, a set-off or counter-claim of over \$400, and nearly \$500, and within five cents as much as the plaintiffs' demand. Both of these were subsisting and independent demands, and could have been prosecuted for as such, affirmatively, in a court of justice. There was no payment or application of either upon the other until such application was made by the referee, with the consent of the law, and of the defendants on the trial

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of the cause. If there was any conversion or other tort, for which the defendants could have prosecuted the plaintiffs, it was virtually, if not expressly, waived by the act of the defendants in their answer, and upon the trial, asking compensation from the plaintiffs, and the application of the amount thus obtained upon the plaintiffs' demand. Both demands were therefore matters of account, within the meaning of section 54 of the Code, whereby a justice of the peace is excluded from entertaining jurisdiction "where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars." In this case the causes of action of each party (plaintiffs and defendants) exceeded that sum, and I can perceive no authority for saying that a justice of the peace would have had jurisdiction, unless the parties had voluntarily relinquished a portion of their demands. This it would have been unsafe for the plaintiffs to do; for the defendants, not relinquishing any portion of theirs, could have prosecuted in an independent action in a court of record, and recovered the whole amount of their demand; or, if obliged to set off in the justice's court, must have recovered a judgment against the plaintiffs, over and above the plaintiffs' demand, for an amount equal to the sum relinquished by the plaintiffs, as the amount of their respective claims was equal, or so within five cents. (*Stilwell v. Staples*, 3 Abb. 365. 5 Duer, 691. *Matteson v. Bloomfield*, 10 Wend. 555. *Mills v. N. Y. Com. Pleas*, Id. 557. *Brady v. Durbrow*, 2 E. D. Smith, 78. *Parker v. Eaton*, 25 Barb. 122. *Gilliland v. Campbell*, 18 How. 177.)

The case of *Crane v. Holcomb*, (2 Hilt. 269,) if it is to be regarded as adverse to this view, is against the weight of authority. But it was disposed of upon different considerations, and under a different statute. 1. The question arose under the act conferring jurisdiction upon the district courts of New York, (1 Laws of 1857, p. 707,) which

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is different in language and legal effect. 2. It was decided *mainly* upon the effect of subdivision 4 of section 304 of the Code, which gives costs to the plaintiff, of course, in actions for the recovery of money, where the plaintiff shall recover \$50, and section 305, which gives costs, of course, to the defendant, in the actions before mentioned, where the plaintiff is not entitled to costs therein.

The other cases cited by the defendants' counsel, *Trust v. Person*, (3 Abb. 84,) and *Peet v. Warth*, (1 Bosw. 653,) are without much bearing on the present question. The first merely decides, in effect, that an action to enforce a lien, as presented by the complaint then before the court, was an action for the recovery of money, and must be determined, in regard to costs, by subdivision 4 of section 304. And the last was a case strictly within that subdivision; at least it does not bear upon the present question.

It is upon section 305 and the 4th subdivision of section 304 that the argument of the defendants' counsel in this case is based; and if subdivision 4 of section 304 was the only one to be considered, the defendants would be right. But the several subdivisions of that section (304) must be considered in connection with each other, and each must be allowed to have force. Subdivision 3 of section 304 gives costs to the plaintiff upon a recovery (for any amount) "in the actions of which a court of a justice of the peace has no jurisdiction." This is an action of that kind, and must be construed, I think, to allow the plaintiff's costs, notwithstanding subdivision 4 provides for costs to the plaintiff, in actions for the recovery of money, where he recovers fifty dollars; and section 305 gives the defendant costs where the plaintiff is not entitled to them. There is no other way of harmonizing subdivisions 3 and 4, or of making both of them operative, but by allowing full force to subdivision 3 in all cases in which it is appli-

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cable, and limiting the operation of subdivision 4 to cases which are not covered by subdivision 3.

I have no doubt this is in accordance with the intent of the legislature, as it seems plainly to be with the weight of authority.

The plaintiffs, therefore, and not the defendants, are entitled to costs; and as the defendants have insisted upon taxing costs in their favor, and entering judgment therefor, I think the motion must be granted, with \$10 costs.

[ALBANY SPECIAL TERM, August 27, 1867. *Hogeboom*, Justice.]

PHEBE MARBLE vs. JOHN LEWIS.

An offer of judgment, in an action for the recovery of dower, for five and a half acres of the land claimed without further description, is too indefinite a foundation for a judgment. A judgment according to the terms of such an offer would be void for uncertainty. Nothing could be delivered to the plaintiff upon an execution issued on such a judgment.

Such an offer of judgment, so far as the damages are concerned, should be for a sum certain, so that, if accepted, judgment for the amount can be at once entered.

The rule is well settled, in this state, that when lands are alienated during coverture, by the husband, his widow is entitled to be endowed of such lands, amounting to one-third of the value at the time of alienation. Such was the rule before the Revised Statutes, and it was not changed by the revision.

Where the whole premises were alienated during the lifetime of the husband, damages can be recovered only from the time dower was demanded; not from the death of the husband.

In case of such alienation by the husband, the correct practice is, to ascertain, upon the trial, when the premises were alienated, and in case the value of the premises is greater at the time of trial than at the time of alienation, from causes other than improvements made subsequent to such alienation, upon the premises, to ascertain the value at the time of alienation; and the judgment should provide for admeasurement according to such value.

The value can be more satisfactorily determined upon the trial than by the commissioners; but the question as to improvements is to be determined by the commissioners.

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Where all that appears in the case is that it was admitted, on the trial, that improvements had been made upon the land, and that the premises were more valuable than when the husband's title passed from him, the only proper judgment is that commissioners be appointed, upon application to the court, to admeasure dower in the land, pursuant to the statute; unless it affirmatively appears that the lands were enhanced in value from other causes.

A judgment for the unqualified recovery of one-third of the land is not warranted, in such a case.

ACTION to recover dower in the premises described in the complaint, and damages for withholding the same.

It was admitted that Sidney Marble, the plaintiff's husband, was seised of said lands during coverture, and that she demanded her dower, before the commencement of this action. It was also admitted that on the 14th day of February, 1842, a judgment in the Supreme Court of this state was duly rendered against said Sidney Marble, by virtue of which such lands were sold, and the title in him divested, in 1843, and that the defendant is, and was at the time of the demand of dower and the commencement of this action, in August, 1862, in possession of said premises by virtue of the title thus acquired. It was further admitted that neither said Sidney Marble nor the plaintiff had been in possession of, or exercised any control over, said premises since the sale under said judgment; and that Sidney Marble died in 1861. Upon these admitted facts, the justice before whom the action was tried decided that the plaintiff was entitled to judgment "for one-third part of the lands described in the complaint, and thirteen dollars damages, for detention, or mesne profits."

The defendant appealed from the judgment.

J. W. Smith, for the appellant.

Bemis & Stevens, for the respondent.

By the Court, GROVER, J. The court, upon the trial, had nothing to do with the offer of judgment served by the

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defendant upon the plaintiff. That offer only affects the question of costs; which question, as thus affected, did not arise until the rights of the parties had been determined, and it appeared from such determination that the defendant was entitled to costs subsequent to the offer. (*Code*, § 385.)

These offers were not evidence upon the trial. The offer appears as part of the evidence given upon the trial, and from the opinion of the judge its effect appears to have been determined by him. I think that determination correct. The offer was too indefinite a foundation for a judgment. A judgment for the recovery of five and a half acres of the land claimed, without further description, would have been void for uncertainty. Nothing could have been delivered to the plaintiff upon the execution issued upon such a judgment. The same remark applies to the offer, so far as the damages are concerned. It should have been for a sum certain, so that, if accepted, judgment for the amount could have been at once entered.

From the finding of facts by the judge it would appear that the offer was for a sum certain, viz., eight dollars, but from the offer found in the case it was for the rents and profits of the five and a half acres, from the death of the husband. The case leaves it uncertain whether damages were awarded to the plaintiff from the death of her husband, or from the time dower was demanded by the plaintiff. If the former, it was error; if the latter, it was correct. The land of which dower was sought to be recovered was alienated by the plaintiff in 1843, long before his death; and in case of alienation by the husband in his lifetime, damages can only be recovered from the time of a demand of dower. The defendant's counsel insists that in such a case no damages at all can be recovered; but the statute expressly gives damages from the demand. (3 *R. S.* 83, § 20.) From the printed portion of the case it would appear that the damages were com-

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puted from the death; but from the words added in writing, the computation may have been from the demand of dower only. To warrant a reversal of the judgment, error must affirmatively appear; uncertainty is not sufficient.

The more material question in the case is whether the judgment is correct in awarding the plaintiff one-third of the lands described in the complaint, or whether it should have provided for the recovery of land equivalent in value to one-third of the value of the land, as such value was at the time of the alienation by the husband, in 1843. The rule appears to be settled, in this state, that when lands are alienated during coverture, by the husband, his widow is entitled to be endowed of such lands amounting to one-third of the value at the time of alienation. Such was the rule before the Revised Statutes. (*Shaw v. White*, 13 John. 179. *Dorchester v. Coventry*, 11 id. 509. *Humphrey v. Phinney*, 2 id. 484.) This rule was not changed by the revision. (*Walker v. Schuyler*, 10 Wend. 481.) The question is, whether, in such a case, in an action for the recovery of dower, the plaintiff is entitled to judgment for the recovery of one-third of the land, or whether the judgment should be for the recovery of land of the value of one-third of the value of the whole at the time of the alienation; and whether the judgment should settle the value at the time of alienation, and consequently the value to be recovered? It is insisted by the plaintiff that although the rule may be as stated, yet the former is the judgment to be given, and that the commissioners to admeasure dower are to settle the question of the value at the time of alienation, and consequently the value of the land to be admeasured. I am not aware that this precise question has been settled by any adjudication. The cases above cited from *Johnson* tend to show that in the former action of dower, previous to the Revised Statutes, the extent of the widow's right of recovery, in case of alien-

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ation by the husband during his life, was to be ascertained upon the trial, and fixed by the judgment; otherwise the pleas demurred to were improper and should have been overruled. The case in the 10th of *Wendell* tends to show that in the action of ejectment for the recovery of dower, given by the Revised Statutes, as a substitute for the former action, the extent of the widow's right was not fixed by the judgment, but was ascertained by the admeasurement of dower after judgment in the ejectment suit. The point does not appear to have been presented to the court in any form, but the case shows that the court set aside the report of the commissioners, because they were not guided in the admeasurement by the value at the time of alienation, but adopted the value at the time of the death. The point has not been decided, under the Code. I think the correct practice in case of alienation would be to ascertain, upon the trial, when the premises were alienated, and in case the value of the premises were greater at the time of trial than at the time of alienation, from causes other than improvements made subsequent to such alienation, upon the premises, to ascertain the value at the time of alienation, and that the judgment should provide for admeasurement according to such value. The value can be more satisfactorily determined upon the trial than by commissioners. There is no way that the latter can ascertain such value, except from the testimony of witnesses, and the statute has not, in terms, conferred any such power upon the commissioners. It does provide that where improvements have been made, such improvements, if practicable, shall be given to the owner of the inheritance; if not practicable to do this, that an equivalent for such improvements shall be given to such owner; thus conferring the power upon the commissioners to ascertain and determine by whom the improvements were made, and their value. It will thus be seen that the question as to improvements is to be determined by the com-

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missioners. In the present case I do not think the question as to the value of the land at the time the title of the husband was extinguished by the sale on the judgment against him, necessarily arises. The presumption, in the absence of proof to the contrary, is that the value was substantially the same then as at present. The *onus* of showing that it was less was upon the defendant. The case does not show any exception to the ruling of the court in rejecting proof offered by the defendant, upon this point. All that appears in the case is that it was admitted that improvements had been made upon the land, and that the premises are more valuable than they were when the husband's title passed from him, in 1843. For aught that appears, the increase of value is in consequence of the improvements. The improvements, we have seen, fall within the power of the commissioners to determine. The judgment rendered by the judge, in this respect, was that commissioners be appointed upon application to the court to admeasure dower in the land, pursuant to the statute. This was the only proper judgment, unless it affirmatively appears that the lands were enhanced in value from other causes. The judgment actually entered is not warranted by the order of the judge. That judgment is for the unqualified recovery of one-third of the land. An appeal from the judgment is not the proper mode of correcting this error. It should be done upon motion at special term. No question is made but that the plaintiff was entitled to costs, unless precluded by the offer of judgment. We have already seen that the offer in this case was insufficient for that purpose.

The judgment should be affirmed.

Ordered accordingly.

[ERIE GENERAL TERM, September 2, 1867. *Daniels, Grover and Marvin*, Justices.]

TANNER *vs.* MARSH.

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70h 60
53 438
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53b 438
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Where a party, sued in a justice's court by short summons, as a non-resident of the county, omits to appear, and judgment is rendered against him, by default, the county court, on appeal, has no power, upon affidavits tending to excuse the defendant's default, and to show that he was a resident of the county, to reverse the justice's judgment, on the ground of error in fact, in that the defendant should have been sued by long summons.

In such a case the provision of section 866 of the Code, which declares that when it is shown by the affidavits served on the part of the appellant, or otherwise, that manifest injustice has been done, and the default is satisfactorily excused, the county court, in its discretion, may set aside or suspend the judgment, and order a new trial before the same or another justice, should be applied, and not the provision for the correction of *errors in fact*.

A PPEAL from a judgment of the county court of Erie county, reversing a judgment of a justice of the peace. The plaintiff commenced an action in a justice's court, against the defendant, by a short summons, which was personally served. The defendant did not appear before the justice, and judgment was rendered in favor of the plaintiff, and the defendant appealed to the county court. That court, upon affidavits tending to excuse the default of the defendant, and to show that at the time when the summons was served, the defendant was a resident of the county of Erie, reversed the judgment of the justice.

L. Spring, for the appellant.

H. Thornton, for the respondent.

By the Court, DANIELS, J. The county court reversed the judgment of the justice, because it became satisfied, from the affidavits produced and read upon the hearing in that court, that the defendant was a resident of the county of Erie, and could not therefore be sued by a short summons. With the correctness of this conclusion, this court, upon the present appeal, has nothing whatever to do. (*Wavel v. Wiles*, 24 N. Y. Rep. 635.) The question

presented for its consideration is, whether that court could properly reverse the justice's judgment when it became satisfied, from the affidavits, that the defendant was a resident of Erie county, and should therefore have been sued by a long summons. The only authority for the reversal of the justice's judgment relied upon by the defendant's counsel, is that which section 366 of the Code provides. By that it is provided that "if the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses." This proceeding is not confined to cases where the defendant fails to appear before the justice, but it extends to all cases where an error in fact not affecting the merits of the action, and not within the knowledge of the justice, may have intervened in the course of the proceedings in the action. For errors of this nature, whenever they may be established, either by affidavits or by the examination of witnesses, the county court is authorized by the preceding portion of the section referred to, to reverse the justice's judgment. The Code itself has not undertaken to declare what the errors of fact are, for which the judgments of justices may be thus reversed. If they are to include all questions of fact which may arise in actions in justices' courts, not within the knowledge of the justice, affecting the regularity of the proceedings, then a multitude of questions are brought within the jurisdiction and determination of the county court upon affidavits, which, previous to the enactment of the Code of Procedure, were very differently disposed of. These questions are often of such a nature as to render them the proper subjects of pleading and trial in the ordinary course of proceeding in an action. And when so disposed of, the party conceiving himself aggrieved is entitled to have them reviewed by

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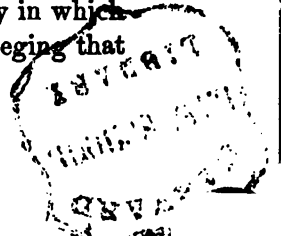
appeal, by the appellate tribunals provided by law. This is an important right, which parties to legal proceedings should not, without good reason for it, be deprived of. No such reason exists in the present instance, because the legislature have not provided that the terms used in this section of the Code shall receive so great a latitude of construction as to render them productive of that result. Previous to the enactment of the Code, these terms "error in fact" had acquired a definite legal signification. And they included cases where the action had been prosecuted or defended by a married woman, or by an infant, for whom no next friend or guardian had been appointed, and cases where parties, witnesses and jurors misconducted themselves to the prejudice of the party against whom the judgment was recovered. (2 *Burr. Pr.* 152. *Harvey v. Rickett*, 15 *John.* 87. *Camp v. Bennett*, 16 *Wend.* 48.) In these cases, and perhaps others of the same general nature, the party defeated in the action could, by the practice existing before the adoption of the Code, allege the disability or misconduct relied upon as error in fact. And if that was denied, an issue of fact was formed, which the law required to be tried and determined by a jury. (2 *Burr. Pr.* 152-154.) This formed a complicated, troublesome and expensive proceeding, entirely unadapted to the inconsiderable amounts forming the subjects of controversies brought before justices of the peace. This proceeding it was the object of the Code to abolish, where the error in fact arose in actions pending in justices' courts, and to substitute for it a hearing in the county court, upon affidavits or the examination of witnesses. In doing this it was not the object of the law to extend the legal signification of the terms used, but to provide a new and simple proceeding for ascertaining and correcting such errors as were not within the knowledge of the justice, and were included in the legal comprehension of the terms "error in fact."

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This conclusion is in conformity with the settled rule applied to the construction of statutes, making use of terms which have previously acquired a definite legal or technical signification. Such terms, when they are made use of by the legislature, in the enactment of laws, are presumed to have been used according to their previous legal acceptance, where nothing warranting a different conclusion is contained in the statute. *Sedgwick on Stat. and Const. Law*, 261-265.) And there is nothing in the Code that will justify the supposition that these terms were used in any different sense in this instance.

According to this construction of this section of the Code, which it is manifest is the one that should be given to it, this portion of it did not include the controversy presented by the appeal to the county court in this action. And that court, therefore, should not have reversed the justice's judgment for the cause shown by the affidavits.

Where the defendant fails to appear before the justice, a different proceeding is provided for the purpose of relieving him from his default, by the succeeding portion of this section of the Code. Under that portion of the section, the judgment of the justice is not to be reversed. But when it is shown by the affidavits served on the part of the appellant, or otherwise, that manifest injustice has been done, and the default is satisfactorily excused, the county court, in its discretion, may set aside or suspend the judgment, and order a new trial before the justice who rendered the judgment, or some other justice in the same county. (*Code*, § 366.) This is the provision which should have been applied to the disposition of this case when it was before the county court, and not that providing for the correction of errors in fact. Then the defendant would have been afforded an opportunity to appear in the action before the justice, and there plead in abatement the fact of his residence in the county in which the action was brought. And if the answer alleging that



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fact should have been found to be true, it would necessarily have resulted in the dismissal of the suit.

This proceeding may still be taken by the defendant, if the county court shall be satisfied, upon the affidavits produced before it, that the defendant's default in not appearing before the justice has been satisfactorily excused, and that manifest injustice has been suffered by him in consequence of the judgment which the plaintiff has recovered against him. Whether that be so or not, it is for the county court, and not for this court, to decide.

The judgment of the county court, reversing the judgment of the justice, should be reversed, and that court be directed to proceed and hear the defendant's application to set aside or suspend the judgment of the justice, and for a new trial to be had in the action.

[ERIE GENERAL TERM, November 18, 1867. *Daniels, Marvin and Davis, Justices.*]

WILLIAM, Earl of Craven, and another, vs. JOHN S. PRICE.

Where, in an action for wrongfully withholding from the plaintiffs the possession of certain land of which they were the owners in fee, and cutting and severing grass from such land, and making it into hay and converting it, the defendant admits the title to the land to be in the plaintiffs as alleged, but claims that he was rightfully in possession of the premises, and had a right to cut and dispose of the hay, under the license and permission of the plaintiffs, by virtue of an executory contract by a third person to purchase the land, the *title to land* does not arise; and if the plaintiff recovers a verdict for \$15 only, the defendant is entitled to costs.

APPEAL by the plaintiffs from an order made at a special term denying a motion for a retaxation of costs.

C. W. Brandt, for the appellants.

Hakes & Stevens, for the respondent.

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By the Court, MARVIN, J. The plaintiffs alleged, in their complaint, that they were the owners in fee of certain land described; that one Albert G. Brown wrongfully withheld possession from them, and cut and severed certain grass from the land, and made it into hay; that the hay was the property of the plaintiffs, as alleged; second answer—a denial of all the other allegations in the complaint; third answer—alleges that the plaintiffs had a right to the possession of the land, and that Brown was lawfully in possession, under license and permission of the plaintiffs, and those who were the owners thereof prior to the plaintiffs, under and by virtue of an executory contract for the purchase of the land by Brown, with the license and permission of the plaintiffs, with the right to the possession and rents and profits thereof; and that while so in possession, Brown cut the hay, as he lawfully might, and sold it to one Ewers, who transferred it to the defendant, and the latter took it away, as he lawfully might. The plaintiffs had a verdict for \$15, and the clerk taxed costs in favor of the defendant.

Does a claim of title to real property arise on the pleadings in this case? It is argued that the third answer raises the question of title, as it states that Brown was lawfully in the possession of the lands, under the license and permission of the plaintiffs, *and those who were the owners thereof prior to the plaintiffs*, under and by virtue of a contract for the purchase of the lands by Brown, with the license and permission of the plaintiffs, with the right to the possession, and rents and profits thereof. What does the pleading here mean? It is claimed that under the allegations here made, the defendant, on the trial, would have been permitted to prove title in prior owners, and a contract with Brown for the purchase of the land, and license to possess the land, &c. The defendant, however, says Brown was in possession under the license and permission of the plaintiffs and those who were the prior own-

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ers, under a contract, &c., with the license and permission of the plaintiffs. Brown's possession was under the license of the plaintiffs, and if other persons who were previous owners, assented thereto, how could that affect the question of license? Again; Brown was in possession under a contract to purchase, with the license and permission of the plaintiffs. The license and permission of the plaintiffs for what? Clearly, to possess. The defendant did not propose by his answer to defend upon the ground that Brown was rightfully in possession under and by virtue of a contract to purchase the land of some prior owner, simply, but he avers that his possession was under the license and permission of the plaintiffs. The fair construction of the answer is, that Brown's possession and right to cut and dispose of the hay, was under the license and permission of the plaintiffs.

I think the order appealed from should be affirmed, with \$10 costs.

Order affirmed.

[ERIE GENERAL TERM, November 18, 1867. *Danids, Marvin and Davis*, Justices.]

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HEATH vs. BARMOUR.

The plaintiff brought an action in a justice's court, alleging in his complaint that the defendant wrongfully and unlawfully broke and entered his close, and cut timber and did other acts upon said premises. The defendant, by his answer, justified all the acts complained of, on the ground that the *locus in quo* was a public highway, used and occupied by the public as such. *Held*, that the justice was right in dismissing the action, on the ground that the title to land came in question.

If the plaintiff, in such a case, on continuing his action in the Supreme Court, recovers a verdict for trespasses committed by the defendant outside of the alleged highway, he is entitled to costs, although upon the trial the defendant succeeds in justifying all his acts committed upon such highway.

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In such a case the defendant should, in his answer, carefully describe the highway, and limit his justification to the premises described; and then, as to all alleged trespasses other than those within the limits described, he can set up a denial, or license, or any defense he may have, other than title. He should see to it that his answer is not too broad.

MOTION by the plaintiff, by way of appeal from an adjudgment of costs in this action, by the clerk of Chautauqua county. The action was brought, originally, in a justice's court. The plaintiff alleged, in his complaint, that the defendant wrongfully and unlawfully broke and entered the plaintiff's close, in the town of Gerry, in the county of Chautauqua, on or about the months of May, June, July, August and September, in the year 1862; also, in the months of April, &c., 1863, and so as to 1864, 1865 and 1866; and the defendant, during each and all of the said months and years, being wrongfully and unlawfully upon the premises of the said plaintiff, in the town of Gerry, in the county of Chautauqua, did then and there, by himself, his agents and servants, with teams, horses, oxen, wagons, plows and scrapers, wrongfully and unlawfully excavate the said premises, and did then and there wrongfully and unlawfully cut timber of the plaintiff, upon his premises aforesaid, and destroy crops then and there growing, pull down and destroy fences of the plaintiff, and build bridges, to the great injury and damage of the plaintiff, &c.

The defendant, by his answer, first, denied each and every allegation in the complaint. For a second answer, he admitted that at divers times claimed in the complaint, he had been upon the ground and along a certain locality in said town, known as the plank road, and had done various work therein, in repairing the same and bridges thereon; that such acts and labor were such only as were necessary and proper in repairing such road and bridges, in obtaining bridge timber, and other articles necessary for such purpose, and "which are the acts complained of in said complaint; that at the times aforesaid said locality

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was a public highway, used and occupied by the public as such, and at such times of said alleged wrongs and acts upon, in and on said locality and premises, the said defendant was acting pursuant to the orders and directions of the commissioners and overseers of highways of said town, as he of right might do; and all he did there was in pursuance of such authority and directions, in repairing and fixing such road."

There was a further answer, that prior to the acts set forth in the second answer, the Fredonia and Sinclairville Plank Road Company owned the locality, and had full right and authority to use the same; that such company had abandoned said locality, and the same reverted to the public, and belonged to the town of Gerry, for the purposes of a highway, and was worked and improved as such; and that all *acts* done prior to such abandonment were pursuant to the authority and direction of such corporation.

There was another answer, that after the commission of said alleged wrongs and trespasses, and each of them, the damages in consequence thereof were properly and duly appraised by proper authority, and said plaintiff duly notified thereof, and such damages were duly tendered and paid to the plaintiff, and were brought into court for his use and benefit.

There was a further answer, that the acts done by the defendant upon and about said premises, as aforesaid, were fully ratified, and confirmed and authorized by virtue of an act of the legislature, passed April 13, 1866.

The defendant demanded judgment for costs of suit. He gave the undertaking required by the Code, and the justice countersigned the pleadings and dismissed the action.

The plaintiff then brought this action. It was tried by the court, and the court decided that all the alleged trespasses committed within the limits of what was known as

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the plank road, and then the highway, after the plank road ceased to occupy, were justifiable. The plaintiff, on the trial, proved certain trespasses committed in his field, outside of the bounds of the highway. The court overruled the defense of a tender of the damages, and directed a judgment for damages for the trespasses outside of the highway, for three dollars. The judge before whom the trial was had, at the instance of the defendant's attorney, certified that on the trial title to real estate was in issue so far as the line of the "old plank road was concerned;" and as to the alleged trespasses thereon, the court reported in favor of the defendant. That as to the alleged trespasses outside of the line of the road, title to real estate did not come in question. Each party claimed a full bill of costs. The clerk taxed the defendant's bill, and refused to tax the plaintiff's bill.

A. Hazeltine, for the plaintiff.

C. N. Lockwood, for the defendant.

MARVIN, J. The second and third answers of the defendant justify all the acts of which the plaintiff complains, on the ground that the *locus in quo* was, at the time the acts were committed, a highway used by the public, and belonging to the town, or the plank road company.

The justice must have so understood these answers. He did not understand that there were any alleged trespasses not met by these answers, and which remained for trial under the issue found by the general denial. The defendant tendered the undertaking required by law, and demanded judgment for costs of suit. The justice was right in dismissing the action.

It is now claimed by the defendant that the complaint embraced different causes of action; that is, causes of action for the alleged trespasses upon the lands included

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was a public highway, used and occupied by the public as such, and at such times of said alleged wrongs and acts upon, in and on said locality and premises, the said defendant was acting pursuant to the orders and directions of the commissioners and overseers of highways of said town, as he of right might do; and all he did there was in pursuance of such authority and directions, in repairing and fixing such road."

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C. N. Lockwood, for the defendant.

MARVIN, J. The second and third answers of the defendant justify all the acts of which the plaintiff complains, on the ground that the *locus in quo* was, at the time the acts were committed, a highway used by the public, and belonging to the town, or the plank road company.

The justice must have so understood these answers. He did not understand that there were any alleged trespasses not met by these answers, and which remained for trial under the issue found by the general denial. The defendant tendered the undertaking required by law, and demanded judgment for costs of suit. The justice was right in dismissing the action.

It is now claimed by the defendant that the complaint embraced different causes of action; that is, causes of action for the alleged trespasses upon the lands included

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in the highway, and also causes of action for the trespasses committed upon the lands of the plaintiff, outside of the bounds of the highway, and that the defendant intended only to justify his acts in the highway, and that his answers should be so construed. This claim is unfounded. The plaintiff, in his complaint, says nothing of any highway. He alleges that the defendant wrongfully broke and entered his close, in the town of Gerry, and at the times named, and then and there did certain acts. He ignores any highway. If he should be right in his position that there was no highway, then it would be immaterial whether the trespasses committed were confined to a strip of land four rods in width, or extended over a wider space. The defendant begins his answer by admitting that he had been upon the ground in and along a certain locality in said town, known as the "plank road," and had done certain acts "which are the acts *claimed* in said complaint," and that said *locality* was a public highway, &c. &c., and that at such times of said alleged wrongs and acts upon, in and on *said locality* and premises, he was acting pursuant to the directions of the commissioners and overseers of highways of the town, as he of right might do. It is not necessary to refer, more particularly, to the next answer. It is equally definite, and extends to all the acts complained of by the plaintiff. On the trial the defendant succeeded in justifying all his acts upon a certain strip of land, by showing that it was a highway; but he had trespassed outside of this strip of land, and for these trespasses he had no justification, and three dollars damages were allowed. Which of the parties is entitled to costs? "If the judgment in the Supreme Court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial." (*Code*, § 61.)

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In this case the *judgment* is for the plaintiff, and he is entitled to costs. The word *judgment*, as here used, means a recovery of damages by the plaintiff, evidenced by the verdict or the finding and decision of the court, entitling the plaintiff to a judgment. The right to costs is to be determined by the recovery, confining the parties to the issue touching title.

In *Burhans v. Tibbits*, (7 How. Pr. 74,) Justice Wright says, "that when the section speaks of a recovery in an action where a claim of title arises, it means that such claim of title shall arise on the entire pleadings, and that the recovery shall be in hostility to such claim."

In the present case the recovery by the plaintiff is in hostility to the claim of title set up by the defendant, as the defendant's claim of title was not limited to any particular piece of land, but was coextensive with the alleged trespasses.

Hall v. Hodskins (30 How. Pr. 15) is in point in this case. In that case the action was trespass for breaking and entering the close of the plaintiff, and the defendant answered that the acts complained of were done in and on a certain road which he had a right to use. On the trial, the defendant gave evidence tending to establish a road across the plaintiff's close, and the plaintiff abandoned any claim for damages for acts committed on the alleged road, but claimed damages for the trespasses outside of the road, and he had a verdict for \$1.56. At special term it was decided that the defendant was entitled to costs. Upon appeal to the general term the order of the special term was reversed, and costs were given to the plaintiff. The case contains the arguments of counsel, which are very able and elaborate. The opinion of the court is by Bockes, J. In it the learned judge fully considers and ably discusses the questions presented in that case, and they are the same as those now under consideration in the present case; and concurring in the views taken by the

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court in that case, I do not think it material that I should add any further remarks. It may be well to reiterate what is said in the opinion in that case, that if the defendant wishes to justify certain of the alleged trespasses, under a right of way, he should describe the way, and limit his justification to the *locus in quo* particularly described. The pleadings, now, in a justice's court, are complaint, answer and demurrer, and no others are allowed. The issue or issues must be framed before the justice. In the present case the defendant should, in his answer, have carefully described the highway, and limited his justification to the premises so described; and then as to all alleged trespasses other than those within the limits described, he could have interposed a denial, or license, or any defense he had, other than title. The justice, upon the giving of the undertaking, would dismiss the action as to the alleged trespasses upon the close embraced by the answer setting up title, and would proceed to the trial of the issues touching the alleged trespasses not justified by the plea of title, in case the plaintiff should decide to proceed in his action for such trespasses. If the plaintiff should not claim that any trespasses were committed outside of the *locus* particularly described by the defendant, then the action would be dismissed generally; and I think the plaintiff, in his action in this court, would be confined to the *close* particularly described by the defendant, and in which the answer and defense of title applied. In this way no difficulty can arise. The defendant must see to it that his answer in the justice's court is not too broad.

The exception contained in section 61, to wit, "that upon a verdict he (the defendant) shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial," has no application to the present case. This embraces costs when the defendant has a verdict. He may have defeated the plaintiff upon grounds entirely aside from any question of "title

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to real property," and such title may not have come in question on the trial; and if so he shall not have costs, but shall pay costs, because he, by pleading title in the justice's court, caused the litigation to be removed into the Supreme Court. This was not a case for the certificate of the judge, and the certificate given has no effect upon the question of costs.

The plaintiff's motion must be granted, with \$10 costs.

[CHAUTAUQUA SPECIAL TERM, January 18, 1868. *Marvin*, Justice.]

 SEYMOUR vs. COOK.

The plaintiff stopped at the defendant's tavern with his two horses, which he had put in the barn and fed, and took dinner himself. Having paid his bill, he requested the defendant to get his horses. The latter told him to go on and be hitching up, and he (the defendant) would be out in a few minutes. The plaintiff went to the barn, put the head-stalls on the horses, and while getting the team out, the defendant arrived. Previously two men arrived at the inn, and placed their horse (a stallion) in a stall between those occupied by the plaintiff's horses and the outer door. The plaintiff led one of his horses out of the door, and the other followed on, as it was accustomed to do, and when passing the stall where the stallion stood, received a kick from him which broke its leg, resulting in its death. *Held* that the defendant's liability as an innkeeper was not at an end, when the injury occurred, the horses being still on his premises, and in his barn; that the plaintiff was only doing for the defendant, and with his assent, what it was his duty to do himself; and that unless there was some improper conduct on the part of the plaintiff, which caused the injury, the defendant was liable to the same extent as though he, instead of the plaintiff, had been handling the horses at the time.

THIS action was brought against the defendant, as an innkeeper, to recover the value of a horse which was injured while in his stable. The jury found a verdict for the plaintiff for the value of the horse, \$140; and from the judgment rendered thereon the defendant appealed.

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John Molloy, for the appellant.

Fuller & Bartlett, for the respondent.

By the Court, FOSTER, J. It appeared from the evidence that the horse in question was owned by the plaintiff. That on the 31st of October, 1866, the brother of the plaintiff, and who was in his employ, drove his team, of which this animal was one, to the village of Geddes, and stopped at the tavern kept by the defendant. He had his horses put into the stable and fed, and had his own dinner; for all which he paid the defendant. When he was ready to leave, he asked the defendant to get the horses, who told him to go on and be hitching up, and that he would be out in a few minutes. He went to the barn, put the head-stalls on the horses, and was getting them out, and while doing so the defendant arrived there. Before the defendant reached the barn, two men, named McGee and McKay, rode up in a buggy, and unbridled their horse, which was a stallion, and placed him in a stall between those occupied by the plaintiff's horses and the outer door. The driver of the plaintiff's team led one of his horses out of the door, for the purpose of hitching on the wagon; and the other, being the one in question, followed on, as it was accustomed to do, and, when passing the stall where the stallion stood, received a kick from him, which broke its leg, and rendered it entirely worthless, so that it became necessary to kill it.

The defendant did not deny that he received the horses into his stable, in the character of an innkeeper; but it is insisted, in his behalf, that before the injury happened the servant of the plaintiff had taken the horses into his own possession and charge, and that the relation of landlord and guest had terminated. Upon this question there is no evidence to contradict what is herein before stated, though the testimony of the defendant, to some

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extent, differs from that of the driver; but his own statement is that he started twice to go with the driver to get the horses, but was interrupted; that the driver then said: "I can get my own horses, as you are busy;" to which the defendant replied: "I will be there as soon as I can get there;" and that he did arrive before the injury happened.

There is nothing in this to show that the liability of the defendant as an innkeeper was at an end. The horses were still on his premises and in his barn. The driver was only doing for the landlord, and with his assent, what it was his duty to have done, and unless there was some improper conduct on the part of the driver, which caused injury, the defendant is liable, to the same extent as though he, instead of the driver, had been handling them at the time.

It is also claimed that the injury was caused by the negligence of the driver, in not bringing the horse away from the stall in which the stallion was placed; and the evidence of one of the witnesses, who came there with him and placed him in the stall, was that the driver was notified that it was a stallion, and that he should be careful. It is not necessary to detail the evidence on this point. It is enough to say that to some extent there was a conflict in the testimony; and in my opinion the jury were warranted in finding as they did. The negligence consisted in putting a stallion into an open stall, in a tavern barn, near the outer door, so that those repassing in or out were obliged to pass near him.

The charge of the judge, to which there was no exception, fairly and properly presented all the questions in the case to the jury.

Exception was taken on the trial to the refusal of the judge to charge upon two propositions submitted by the defendant's counsel; but no point has been made upon them, before me; and besides, they were embraced in the charge

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which had been made, and the refusal to charge as requested was placed upon that ground.

There was no error, in my opinion, either in the charge of the court or in the verdict of the jury.

The judgment should be affirmed.

[ONONDAGA GENERAL TERM, January 7, 1868. *Morgan, Bacon and Foster*, Justices.]

THADDEUS C. KINNIER vs. ABBY A. KINNIER.

An action cannot be maintained by a husband against his wife to obtain a decree declaring void a marriage contract, on the ground that a former husband of the defendant went to another state and there commenced a suit against her for a divorce, and that she, by collusion with the plaintiff in that action, aided him in fraudulently obtaining a divorce there; and that the plaintiff married the defendant on the faith of the representation that she "had procured a valid divorce" from her former husband.

If the parties to the former action colluded together and thereby fraudulently obtained the decree of divorce, neither of such parties could possibly avoid such decree. It is binding upon both, and the second marriage is valid; and as the second husband could not be prejudiced, if his marriage was lawful, he—a stranger—has no interest in the matter which will authorize him to impeach the judgment for fraud.

DEMURRER to complaint. The action was brought to obtain a decree declaring void a marriage contract entered into between the plaintiff and defendant on the 28th of June, 1861. The defendant was married to one Pomeroy, in the state of Massachusetts, in 1848. It is charged that in 1855 Pomeroy left Massachusetts, went to Chicago, and commenced a suit against his wife Abby. That the latter, by collusion with her husband, aided him in fraudulently obtaining a divorce in Illinois, &c.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

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G. W. Parsons, for the plaintiff.

C. A. Seward, for the defendant.

CARDOZO, J. The allegation in the complaint that the parties resorted to Illinois to obtain a decree of divorce in fraud or violation of the laws of the place of their domicile, I think unimportant, here. I can very well see how the state of Massachusetts might complain that its citizens had violated their allegiance to it, and how the courts of that state might disregard the judgment of another jurisdiction which granted a divorce to persons domiciled in the former state, who could not have obtained such a decree in the tribunals of that state. But I do not know of any principle, and have not been referred to any decision which sustains the doctrine, that the courts of this state should thus protect the sovereign rights of Massachusetts. The complaint does not question the jurisdiction of the Illinois court over the subject matter, and it shows that that tribunal acquired jurisdiction of the persons of the parties—of the plaintiff by his bringing the action, and of the defendant by her appearing and answering the bill. Whether the rest of the complaint be deemed to charge, in effect, only that certain irregularities occurred in the progress of the suit, or whether it sufficiently alleges that the parties practiced a fraud on the court, and thus procured the decree, will not be material to determine. If the former be the true construction, then it is enough to say that mere irregularity could not affect the decree, and that the plaintiff here—an entire stranger to that litigation—cannot be heard to question the regularity of the proceedings in that suit. He may raise jurisdictional questions, but not mere points of regularity in practice. If, however, the right view of the pleading be the latter one, above mentioned, and if the courts of this state can entertain a suit to annul the decree of a court of another state, on the ground of

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fraud, yet this plaintiff is not in a position to ask any such relief. No one can claim to have a judgment, or a deed, avoided for fraud, unless it injuriously affects him; and such is not the case with this plaintiff. Giving the complaint the most liberal construction for the plaintiff, it charges that the representation upon the faith of which the plaintiff married the defendant, was that she "had procured a valid divorce" from her former husband. In other words, that this plaintiff and she might lawfully be married. Now if this be true, the plaintiff has not been harmed by this deception, and even if the representations were inaccurate, he will not be entitled to annul the marriage. The complaint does not dispute but that if the decree of divorce stands, the defendant would be at liberty to marry, and that, therefore, must be assumed; but it avers that the parties to the divorce suit colluded together, and by such collusion fraudulently obtained the judgment. If that be so, neither of those parties could possibly avoid that decree. (*Bishop on Marriage and Div.* 706.) It is binding upon both of them, and the marriage between this plaintiff and the defendant was valid. Where both parties unite to practice a fraud, neither can be heard to seek relief against it; and as the plaintiff cannot be prejudiced if his marriage was lawful, he, a stranger, has no interest in the matter which would authorize him to impeach the judgment for fraud. That his feelings or prejudices might have revolted at marrying a woman under such circumstances, gives him no standing in court. (*Clarke v. Clarke*, 11 *Abb. Pr.* 230.) Without adverting to other views which lead me to think that this complaint cannot be sustained, enough has been said to show, in my opinion, that the demurrer is well taken, and that there must be judgment thereon for the defendant, with costs.

[NEW YORK SPECIAL TERM, February 8, 1868. *Cardozo*, Justice.]

53	457
123a	350
53	457
129a	372

In the matter of the application of the UNION VILLAGE AND JOHNSONVILLE RAILROAD COMPANY to take lands of Nathan G. Akin.

Where commissioners appointed to appraise land taken by a railroad company, under the statute, for laying its track, awarded to the owner a specified sum, being the value of the land, but refused to increase that amount by allowing consequential damages, based upon the possibility or even probability that the particular business in which he was engaged might be injured, and his property (a flax mill) decreased in value, in consequence of danger to be apprehended from fire emitted from the locomotive engines of the company; *Held* that the commissioners adopted the proper rule of compensation.

A PPEAL by Nathan G. Akin from an order made at a special term, confirming the report of commissioners awarding to him damages for land taken by the railroad company for the purpose of laying its track.

I. G. Thompson and M. I. Townsend, for the appellant.

D. A. Boies, for the respondent.

By the Court, INGALLS, J. About four acres of the appellant's land was taken, and the commissioners awarded him \$1500. The only question raised upon this appeal is, whether the commissioners should have increased the above amount by allowing consequential damages, based upon the possibility, or even probability, that the particular business in which Akin was engaged might be injured, and his property decreased in value, in consequence of danger to be apprehended from fire emitted from engines used by the company in running their road. It is quite obvious that the commissioners, in their estimate, have considerably exceeded the actual value of the land for purely agricultural purposes, as their allowance amounts to about \$400 per acre. The statute which prescribes the course to be pursued by commissioners, in assessing dam-

In the matter of the Union Village and Johnsonville R. R. Co.

ages, is as follows : "Ascertain and determine the compensation which ought justly to be made by the company to the owners or persons interested in the real estate appraised by them ; and in fixing the amount of such compensation, such commissioners shall not make any allowance or determination on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed railroad, or the proposed improvement connected with such road, for which such real estate may be taken." (2 R. S. 5th ed. 674, § 16.)

After a careful examination of the authorities cited by the counsel for the respective parties, we are of opinion that the commissioners committed no error in their determination, by excluding such consequential damages. (*Albany Northern Railroad Co. v. Lansing*, 16 Barb. 68. *Canandaigua and N. Railroad Co. v. Payne*, Id. 273. *Troy and Boston Railroad Co. v. Lee*, 13 Barb. 169.) These decisions have been too long acquiesced in, as sound explications of the law upon this question, to be disturbed without substantial reasons therefor. And we conclude that the case at bar does not present features which should induce this court to interfere with the principle settled by the cases above referred to, or which distinguish this case from those cited. No rule, however just and wise in its application, is without exception, wherein it operates harshly, and possibly the case at bar furnishes an illustration. It is quite obvious that the legislature intended that the advantages which would be produced by the establishment of a railroad should compensate, to some extent at least, for the disadvantages consequent thereupon ; for it is expressly provided that such advantages shall not be taken into account to reduce the damages to which the owner of the land is entitled.

The appellant has upon his land a *flax mill*, which he claims will be endangered by fire, and thereby rendered less valuable. Now in order to determine the damages

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which Akin would be likely to suffer in consequence of an interference with such business, it would involve the inquiry whether or not that particular business was likely to be permanent and profitable, which at best could only be conjectural and unsatisfactory, and furnish no reliable basis for an appraisal of damages. It is clear that the legislature could not have intended that any such uncertain criterion should be adopted. It is not certain that the appellant's buildings would be set on fire by the running of the engines of the company; and if not, then no damages would accrue to the appellant. But if fire was occasioned thereby, through the negligence of the company, it would be liable to respond in damages.

We are therefore of opinion that the commissioners adopted the proper rule in determining the compensation to which the appellant was entitled, and that the order of the special term should be affirmed, with costs.

[ALBANY GENERAL TERM, March 2, 1868. *Ingalls, Hogeboom and Peckham, Justices.*]



BANK OF PRINCE EDWARD'S ISLAND vs. TRUMBULL.

Since the decision of the Court of Appeals in the case of the *Metropolitan Bank v. Van Dyck*, (27 N. Y. Rep. 400,) the constitutionality of the legal tender act is not open for discussion, in this state. *Per* MULLIN, J.

It is also the settled law of the state that in actions for the recovery of debts contracted before the passage of the legal tender act, the plaintiff can only recover the sum agreed to be paid, without any allowance for the difference in value between gold and legal tenders; notwithstanding the debtor may have agreed to pay it in gold or silver coin.

The sum named in a bill or other contract is, in the absence of any provision to the contrary, presumptively payable in whatever is, at the time, a legal tender in payment of debts; but when the parties designate some other currency which is not illegal, it is the right of the creditor to have awarded to him such measure of damages as will constitute payment in the currency intended; and it is the duty of the court to award it.

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Upon a bill of exchange "payable in United States gold coin," the holder, in case of non-payment, is entitled to judgment for an amount equal to the value of the gold, at the time of the trial, in legal tender notes.

There are two standards of value recognized by law—the one gold and silver, the other paper. Either is a legal tender for a debt; and a contract which calls for payment in gold calls for payment in a currency recognized by law; and there is nothing, in law or in reason, which forbids the parties making such an agreement; and when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry such intention into effect.

THIS was an action upon a bill of exchange, drawn "payable in United States gold coin," and accepted by the defendant.

Barlow & Hyatt, for the plaintiff.

Chapman & Scott, for the defendant.

MULLIN, J. The general term in the first district held, in the case of the *Bank of the Commonwealth v. Van Vleck & Tucker*, in December last, (49 Barb. 508,) that the plaintiff, who had loaned to the defendant \$10,000 in gold, to be paid in gold, was entitled to judgment for an amount equal to the value of the gold at the time of the trial, in legal tender notes.

The plaintiff, in the case before me, claims to recover judgment for a sum in currency equal to \$2000 in gold, upon a bill of exchange drawn for that sum, in Charlotte-town, in Prince Edward's Island, by A. A. McDonald & Bro. on the defendant, payable in sixty days from the date thereof, and which was presented to and accepted by the defendant. The bill, upon its face, is payable in United States gold coin.

It will be seen that the cases are identical in principle; and whatever my own views of the law might be, respect for the court that decided the case of the *Bank of the Commonwealth v. Van Vleck & Tucker* would constrain me

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to follow its decision, leaving it to the Court of Appeals to reverse the judgment if, upon more full examination, it shall be found to be erroneous. I heard this case, in that district, while holding court at the request of the presiding justice. I am not, therefore, at liberty to disregard a decision of its general term upon the precise question presented to me for decision. I cannot leave the case, however, without briefly giving my reasons for concurring in the conclusion at which the general term arrived, in the case cited.

The constitutionality of the legal tender act is not open for discussion in this state, since the decision of the Court of Appeals in the case of the *Metropolitan Bank v. Van Dyck*, (27 N. Y. Rep. 400.) It is also the settled law of the state that in actions for the recovery of debts contracted before the passage of the legal tender act, the plaintiff can only recover the sum agreed to be paid, without any allowance for the difference in value between gold and legal tenders, notwithstanding the debtor may have agreed to pay it in gold or silver coin.

It must be considered, also, that the courts of this country that have been called to pass on this question have been nearly unanimous in holding that debts contracted since the passage of the legal tender act, payable by the express agreement of the debtor in gold and silver coin, may be paid by the same amount in legal tender notes.

A contract entered into prior to 1862, for the payment of a given sum of money in gold and silver coin, received the same construction as it would have received had the words specifying in what the payment should be made not been in the contract. It was by law payable only in gold and silver coin, at the election of the creditor, if that provision had not been incorporated in it; in other words, it was construed as it read, "payable in legal currency." When, therefore, such a contract was to be satisfied by payment, since 1862, it receives the same con-

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struction, and is paid by an equal amount of legal tender notes. This construction of the contract became indispensable; or debtors would have been ruined, and the business of the country destroyed.

If this construction had practically the effect of taking from the creditor a portion of his property, it operated with equal severity upon the debtor. His property was reduced in value in the same proportion. The loss fell equally upon all classes. It was a part of the price we had to pay to save the republic. It operated very harshly upon the foreign creditor, whose debt was contracted before the war, and payable in this country, to compel him to accept payment in paper in lieu of gold and silver. But it was impossible to have one rule of law for our citizens and another for foreigners. The same rule of construction must apply to both, and hence each must accept the same measure of satisfaction.

Every contract then made was made impliedly, if not expressly, subject to the power of congress to make paper, instead of coin, a legal tender, or to debase the coin so as to render it of no more value than the same amount in legal tender notes. Whether such laws are just, or wise, is a question for the legislative department, and with which the courts of the country have nothing to do.

Congress did not see fit to debase the gold and silver coin of the country, nor has it repealed the law making gold and silver a legal tender in payment of debts, but it has secured a similar result by making a thing of inferior value of equivalent value, in payment of debts. The debtor is no longer obliged to pay in gold and silver, and the creditor is obliged to accept government notes in satisfaction of his debt.

The intrinsic difference in value between the paper made a legal tender by congress, and gold and silver, is recognized, both at home and abroad. Property is sold, in our own and foreign markets, at one price for gold, and for

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another in paper. This distinction can no more be got rid of than can the distinction between the cotton or linen on which these notes are printed, and the metal out of which the coin is made.

It was not, I apprehend, the intention of the framers of the legal tender act to prohibit the making of contracts payable in coin. The necessities of commerce require that such contracts should be held valid. To hold that they cannot be made would be a most unwise and unnecessary interference with the rights of the citizen, and is uncalled for by the creditors of the government, or the necessities of the people. A merchant in New York orders from a manufacturer in England \$5000 worth of cotton goods; the Englishman understands this to mean \$5000 worth of goods, estimating the dollar as a dollar in gold; the account is made out on this basis. If the sale is on credit, and to be paid in this country, the seller can only be paid by \$5000 in gold, or their equivalent. To obtain this, he must make out his account by adding to the \$5000 the amount necessary to make legal tender notes equal to gold. Before his account can reach this country gold may have materially increased or lessened in price. By taking the value of gold on the day he ships the goods, he may subject himself to a loss, if gold should appreciate in value before the account is adjusted; or he may be demanding more than the purchaser is bound to pay, if it has depreciated. If he leaves the amount to be adjusted by the purchaser, a door is opened for misunderstanding and litigation. Between countries enjoying the advantages of telegraphic communication, this difficulty may not arise, but there is still so large a portion of the world with which we have dealings that has no such communication, that the practical difficulty exists in all its force.

It is also true that merchants may provide, by these contracts, against the annoyance to which I have referred. But the fewer restrictions upon, and embarrassments laid

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in the way of, commercial intercourse the better. Instead of subjecting merchants to this uncertain and unsatisfactory mode of dealing, why not permit them to agree that an indebtedness shall be payable and paid in gold or silver, or its equivalent in paper? It cannot be doubted but that when a contract made since 1862 provides for payment of a given sum in gold coin, it is the intention that it shall be thus paid. If the *intention* of the parties is to govern, what right have the courts to disregard it and compel the creditor to receive a sum less than it was the understanding and *intention* he should receive? The reasoning of the judges seems to be that when the contract is to be performed here, the amount to be paid, by its terms, must be understood as payable in legal tender notes, and that the parties cannot agree that it shall be paid in coin. If it is legally possible for parties to bind themselves thus to pay, the defendant has done it in this case. The language is not open to two constructions, and the intent is perfectly obvious. To reach the result stated, the courts have been governed by the doctrine of the case of *Pinney v. Gleason*, (5 *Wend.* 394.) In that case the defendant's agreement was to pay a certain number of dollars and cents in salt, at a price named, per barrel. The court held that the measure of damages for a breach of the contract was the amount named in the contract, and not the value of the salt. The reason of the chancellor is, that by the contract the defendant had an election to deliver the salt or pay the amount in money; and having failed to deliver the salt, he was bound to pay the money. I am unable to perceive that the decision in that case has any application to this. Salt was not, and never had been, a standard of value. Gold has been, and is, by law, a legal standard of value. The price of salt was not fixed, but fluctuated as did other commodities in market. Gold has not, in fact, varied in value. The paper which has been made a legal tender in payment of debts has varied, and

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because it is made a legal tender, and gold has thereby been treated as an article of merchandise, and its value seems to fluctuate, whereas it is that of the paper only, which fluctuates. That it is not the coin that changes in value is proved by its being received in payment of debts in foreign countries, at the same valuation it received before the act of 1862, and is so received here when we are required to go back to the gold standard.

We know that the value of the American gold dollar is, to-day, in this country and in Europe, of the same value it was seven years ago, and that value is not changed because we have established another and wholly fictitious standard, with respect to which, and with respect to which alone, its value has changed.

We have, as I have already suggested, two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender for a debt, and a contract which calls for payment in gold, calls for payment in a currency recognized by law; and there is nothing in law or in reason which forbids the parties making such an agreement. And I insist that when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of courts to carry into effect such intention.

If the \$2000, to pay which the bill in suit was drawn, were borrowed, the borrower, it is to be presumed, received it in gold, or in property at gold prices. If the bill does not provide for the payment of \$2000 in gold, will any one inform me how the lender could have framed his contract so as to secure to himself payment, by the drawee, of that sum on the day it should be presented for acceptance or payment, and interest? As I have attempted to illustrate in the case of the purchaser of the goods in England, it would be practically impossible to fill up the bill with an amount which, if paid in currency, would exactly equal the same number of dollars in gold. He might transmit

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the bill in blank to an agent, to fill up, with the true amount before presentation, or he might draw the bill "for such sum as will, on the day of presentation for payment, be equal to \$2000 in gold." But when the bill is thus drawn, is the intention of the parties any more clearly expressed that the bill is to be paid in gold or its equivalent, than when it is drawn "payable in gold coin of the United States?"

The sum named in a bill or other contract is, in the absence of any provision to the contrary, presumptively payable in whatever is at the time a legal tender in payment of debts; but when the parties designate some other currency which is not illegal, it is the right of the creditor to have awarded to him such measure of damages as will constitute payment in the currency intended, and it is the duty of the courts to award it. If gold and silver were not, both in law and in fact, legal currency recognized and adopted by all classes of men, there might be some excuse for treating them as if they were articles of merchandise, and the debtor had the right to pay in them or in paper, at his election. But so long as they are recognized as currency, debts payable in them should be enforced, and the intention of the parties should have effect.

I therefore order judgment in favor of the plaintiff, for \$2925.

[NEW YORK SPECIAL TERM, April 6, 1868. *Mullin*, Justice.]

PORTER *vs.* KEMBALL, impleaded with Godfrey.

The defendants, on the transfer of a customer's note to the plaintiff, agreed to indorse it and waive demand and notice, and thereupon made the following indorsement thereon, signed by them, in their firm name: "I waive demand of protest." *Held* that the language of the indorsement might be construed as implying an intention to waive both demand and notice.

Also held, that if the language of the indorsement was too indefinite and uncertain to express a legal contract, the plaintiff might resort to parol evidence to establish one, not inconsistent with the written indorsement.

THIS action was originally commenced before a justice of the peace of Jefferson county, against Thomas Graham, Daniel S. Kemball and Jane E. Godfrey, upon a promissory note made by Graham, February 1, 1861, for \$55.99, payable to the order of Jane E. Godfrey & Co. at the Black River Bank, and indorsed to the plaintiff in the following words: "I waive demand of protest. (Signed) Jane E. Godfrey & Co."

The plaintiff recovered judgment in the justice's court, against the indorsers, for \$79.71 damages and costs. The name of Thomas Graham was dropped out, but it does not appear at what stage of the proceedings. The defendant Godfrey, who was the only one served with the summons, appealed to the county court of Jefferson county, and the action was tried before the county judge and a jury, at Watertown, on the 8th day of July, 1867.

The evidence before the county court tended to prove that Jane E. Godfrey and Daniel S. Kemball were co-partners in a dry goods store at Sacket's Harbor, and that one William J. Godfrey, the husband of Jane E. Godfrey, was their general managing agent in carrying on the business, neither of the partners taking any charge of it. Thomas Graham was a customer at the store, and gave the note in question in settlement of his account. William E. Godfrey took the note to Kemball, the defendant, and the defendant requested him to take it to Mr. Millington and to Mr. Porter, the plaintiff, and see if one of them

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would not cash it. Mr. Godfrey took it first to Mr. Millington, and failing to induce him to buy it, took it to the plaintiff, got it cashed, and applied the proceeds to the use of the firm.

The plaintiff, on the trial, offered to prove that at the time of the transfer of the note, he refused to cash it, unless the firm would waive everything necessary to charge them as indorsers. This evidence was rejected by the judge, and the plaintiff excepted. The same proposition was repeated, with some variations, one of which was that the indorsement was made for the purpose of waiving both demand and protest. The evidence also tended to prove that Mr. Godfrey, immediately after he got the note cashed, informed Kemball, the defendant, of what he had done, and told him that Porter was not willing to take the note, not knowing the maker, but was willing to let the company have the money if they would be responsible, and would waive protest and make him no expense; and that he had done so, and Kemball made no objections.

After the evidence was closed, the defendants' attorney moved for a nonsuit, upon the following grounds:

1. There was no contract of indorsement between the parties.
2. There is no evidence of demand of payment, and the writing on the back of the note does not amount to a waiver of demand and notice. It was also objected that the writing on the back of the note was without authority. The motion was granted, and the plaintiff appealed.

William F. Porter, for the appellant.

Reynolds & O'Brien, for the respondent

By the Court, MORGAN, J. The evidence given, taken in connection with what was offered on the trial, (which,

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for the purposes of argument, may be regarded as though it had been received by the judge,) plainly establishes the fact that the plaintiff, at the time he discounted the note, required Mr. Godfrey to indorse it in the name of the firm, and to waive demand and notice of protest; so that, in the language of the offer of evidence by the plaintiff, the indorsers should "waive everything necessary to charge them as indorsers;" and that the writing on the back of the note was intended to embody that agreement; that afterwards Godfrey informed the defendant what he had done, and the latter made no objection whatever.

As to the authority of Godfrey to indorse the note in the name of the firm, and waive protest, it is not necessary to resort to his general authority as managing agent of J. E. Godfrey & Co., for there is evidence that the defendant requested him to apply to the plaintiff to discount the note, and that the defendant was fully informed of the indorsement and waiver of protest, and made no objections.

The question is, whether the indorsement, by its own terms, amounts to a waiver of demand and notice, and, if not, whether it can be helped out by the parol evidence.

It is the duty of courts of justice to construe an instrument so as to give it effect, if possible, rather than to allow it to become inoperative. Now it may be asked, what the writing on the back of the note means. Its language is, "*I waive demand of protest.*" It presents a sort of ambiguity, and construed literally, does not in appropriate terms waive either demand or notice. If we read it as meaning only waiving demand, then we must reject the last two words. But there is no more reason for rejecting them than there is for rejecting the two preceding words, in which case the waiver of protest would be sufficient to excuse both demand and notice. The most reasonable construction is, that the indorsers waive demand that the note should be protested, or in other words, they agree that they will not demand

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protest of the note. The language is, "I waive demand of protest." This is substantially saying that the note need not be protested. The defendant, in the absence of such agreement, had a right to demand that the note should be regularly protested; but I think he has virtually waived it. This is the only construction consistent with the language employed, and it will give effect to the instrument without doing violence to its language.

That the waiver of protest, when applied to an inland bill of exchange or note, will be construed as a waiver of both demand and notice, seems to be well settled by the authorities. (2 *Pars. on Notes and Bills*, 578, 579. *Coddington v. Davis*, 1 *Comst.* 186.) In *Coddington v. Davis*, (*supra*,) the language of the waiver was not very different from the language used in the case at bar. The indorser wrote to the holder, saying: "Please not protest," &c. * * "and I will waive the necessity of the protest thereof;" which is little if anything more than saying he would "waive demand of protest."

It is not essential that a waiver of protest should be direct and positive, but any words which by fair and reasonable construction imply an intent to waive demand and notice, will have this effect. (1 *Pars. on N. and Bills*, 576.)

On the whole, I am of opinion that the language of the waiver indorsed on the note fairly implies an intention to waive both demand and notice.

If, however, the court should be of opinion that the indorsement fails to carry out the intention of the parties, and cannot be construed into a waiver of demand and notice, then the question remains, whether the parol evidence was admissible to show that at the time of the indorsement it was agreed that the indorsers should be absolutely bound for the payment of the note without the usual demand and notice. This question is discussed by the author already referred to, (1 *Pars. on Notes and Bills*, 584, &c.) and he comes to the conclusion that the law

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seems quite clearly settled, that a parol promise to pay, made by the indorser to the indorsee at the time or subsequent to the indorsement, may be given in evidence to prove a waiver of demand and notice. Thus in *Boyd v. Cleveland*, (4 Pick. 525,) the holder having remarked to the indorser that he had no confidence in the other parties to the note, and would look wholly to him, and the indorser having promised to take up the note when it was due, if not paid by any other party to it, it was held a waiver of notice. (*And see other cases cited in notes, 1 Pars. on Notes and Bills, 584, 585.*)

It is claimed by the respondent's counsel that parol evidence was not admissible to vary the legal effect of the writing on the back of the note. This proposition of the learned counsel cannot be disputed; but when we assume that the writing expresses in legal language the intent of the parties, there is nothing left for the parol evidence to supply. It is only upon the ground that the language of the writing fails to express a legal contract, that parol evidence can be resorted to. If the language of the writing indorsed upon the back of the note is without legal signification, then a waiver of demand and notice may be shown by parol, the same as though nothing had been written. The parol evidence offered plainly proves a waiver both of demand and notice. Does this contradict or vary the effect of the writing on the back of the note? If so, the evidence is clearly inadmissible. And thus we come back to the legal effect of that writing; and adopting the defendant's construction it is simply a waiver of demand, and not of notice, to the indorsers. This construction we refuse to adopt, and we say the writing either contains sufficient to waive demand and notice, or it fails entirely to express the intention of the parties. Doubtless we must reject the defendant's construction of the legal effect of the writing, or we shall be obliged to assent to the correctness of the decision of the judge, in exclud-

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ing the evidence and in dismissing the complaint. But rejecting the defendant's construction of the contract, the plaintiff is entitled to recover, whether we rest the case upon the language of the writing, or, rejecting this as unmeaning, resort to the parol evidence which was excluded by the judge on the trial, and which, if admitted, would have doubtless proved an absolute agreement on the part of the indorser to waive both demand and notice.

The judgment should be reversed and a new trial granted; costs to abide the event.

Ordered accordingly.

[ONONDAGA GENERAL TERM, JANUARY 7, 1868. *Foster, Mullin and Morgan*, Justices.]

JAMES FISK, Jr. and others *vs.* THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILROAD COMPANY, and others.

RUFUS HATCH *vs.* THE SAME.

Where a plaintiff, on an application by the defendants to remove the action to the circuit court of the United States, showed that he had had a domicile in Boston for several years; that last year he purchased a house there, and there his family resided; he coming to the city of New York for the purposes of his business, and returning to his home, in Boston, at intervals as his occupation permitted; *Held* that he was to be deemed a citizen of Massachusetts. The inference as to citizenship is strengthened, in such a case, by the fact that the party has not voted in this state, but has done so regularly in another state, since he took up his domicile there several years ago.

What facts will be deemed sufficient to show that a party has not changed his residence from another state to this?

Presumptively, citizenship of a defendant in another state, being once established, still continues; and if the question as to a change of it be in doubt, the doubt must be resolved against the plaintiffs, upon whom is the burthen of overcoming the presumption.

The object, and the effect of the statutes of this state, passed in 1853 and 1855, requiring corporations created by other states, and doing business in New

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York, to appoint an agent here, to receive service of process against such corporations, were to prevent our citizens being forced to bring a suit against a foreign corporation transacting business within our territory, and to afford them a method of commencing a suit here, against such foreign company; but without in any way cutting off the right of such company, after being regularly sued in our courts, to remove the litigation to the courts of the United States.

A railroad company, whatever acts it may have done within our territory, dwells in the place of its creation, and if not chartered by this state, it is a foreign corporation—a citizen of another state—and its citizenship cannot be questioned, for the purpose of defeating the jurisdiction of the United States courts over an action brought against it.

Unless all the plaintiffs be citizens of the state in whose court the action is brought, and all the defendants citizens of a state other than that, the action cannot be removed to a federal court, under the judiciary act of 1789.

Where it appeared that in one of two suits sought to be removed, the plaintiff was a citizen of this state; in the other the plaintiffs were citizens, one of this state, and the others of other states; and in both cases the defendants consisted partly of citizens of this state and partly of citizens of other states; *Held* that the actions could not be removed, under that act.

The acts of congress of 1866 and 1867, in relation to the removal of causes from state courts to United States courts, commented on and construed.

THE above actions were brought against the defendant, the railroad company, and several individuals who were the directors of said company, for the purpose of setting aside an issue of new stock which had been made, or attempted to be made by the directors; and obtaining an injunction to restrain any transfers or sales of such new stock, in future.

The defendants now applied for an order removing the actions to the circuit court of the United States.

CARDOZO, J. The applications to remove these cases to the United States Circuit Court, notwithstanding the learned and elaborate discussions by the distinguished counsel, do not, I think, present any very abstruse inquiries or serious difficulties.

It will be best first to settle the question of citizenship. No point arises in this respect, except as to Messrs. Fisk and Belden, two of the plaintiffs in one of the suits, and

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as to the Chicago, Rock Island and Pacific Railroad Company, and Mr. Tracy, who are defendants in both actions. All the other parties, whether plaintiff or defendant, are conceded to be citizens of this state.

I am of opinion that neither Mr. Fisk, Mr. Belden, nor Mr. Tracy is a citizen of this state, and also that the railroad company, for the present purpose, is to be regarded in the light of a citizen of another state. As to Messrs. Fisk and Belden, their affidavits of citizenship, as distinguished from mere temporary residence, are explicit and satisfactory. Mr. Fisk shows that he has had a domicile in Boston for several years; that last year he purchased a house there, taking the title in his wife's name, and that there his family live, he coming to this city for the purpose of his business and returning to his home, in Boston, at intervals, as his occupation will permit. He would be regarded as a non-resident of this state, within the meaning of the statute authorizing attachments against the property of non-resident debtors. This view, in conjunction with his oath upon the subject, leaves no doubt that he is, as he asserts, a citizen of Massachusetts.

Substantially similar facts are presented by Mr. Belden, and the question as to him is made more clear by proof that he has not voted in this state, but has done so regularly in New Jersey, since he took up his domicile there, several years ago.

I have not overlooked the fact that both of those gentlemen in the affidavits of justification to the undertaking on the issuing of the injunction, declare themselves to be residents of this state; but even if that be regarded as wholly inconsistent with their affidavits as to their being citizens of other states, I think the latter affidavits should not only be believed, but should control the question; because those affidavits in addition to a statement of a conclusion, to wit, that they are citizens of a specified state, disclose the facts upon which that conclusion is

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based, and no evidence has been given disputing or denying any of the facts detailed by them.

Respecting Mr. Tracy, the testimony is of a somewhat different character, but still I think there is enough to show that he has not changed his residence from Chicago to this city, nor become a citizen of this state instead of Illinois. There is no dispute that for many years prior to his becoming president of the railroad company, he was a citizen of Illinois. He swears that he is so yet. The plaintiff's theory is that he ceased to be so about the time that he accepted the presidency of the company. We must look at the proofs to determine the question. Not being a man of family, the circumstances may not be so marked in his, as in the case of Messrs. Fisk and Belden, but I think they are not the less certain. Presumptively, his citizenship of Illinois continues; and if the question of a change of it be left in doubt, the doubt must be resolved against the plaintiffs, upon whom is the burthen of overcoming that presumption. But I see no circumstance inconsistent with Mr. Tracy's oath that he is still a citizen of Illinois. He was frequently, during the past year, back and forth between Chicago and New York, and invariably, and when he could have had no motive for deception, placed his residence, on the books of the Fifth Avenue hotel, on arriving in this city, as being at Chicago. When he conveyed real estate, he described himself as of Chicago, and he frequently spoke of being a citizen of Illinois, and of his intention not to change his residence; and no person has been produced to prove that he ever asserted anything to the contrary. In Illinois he took the incipient steps to exercise the right of suffrage, having his name registered so as to entitle him to vote if he chose, or if his presence at Chicago, at the proper season, permitted him to do so. In that state only, he paid whatever personal or income tax he has paid. That he did not vote at all, at recent elections, does not assist the plaintiff's

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theory. Had he voted here, or had he caused his name to be registered here, that would have been evidence that he designed to make this state his home; but his omission to place himself in a position to exercise here the right of suffrage, of which it is only reasonable to believe every citizen will feel it his duty and his privilege to avail himself, is rather corroborative of his claim that he did not intend to abandon his residence in Chicago, and that he lost his vote at the last election there, by temporary absence only.

Nor does the proof that Mr. Tracy has paid no personal nor any income tax in Chicago, since the year 1866, make against his claim. It would be significant if the plaintiff had shown that any such tax had been paid by Mr. Tracy *here*, but the omission to pay at all, here or elsewhere, may be attributable, so far as the United States internal revenue is concerned, to the fact that Mr. Tracy claims "not to have made any profit," and so far as the state of Illinois, or the city of Chicago is concerned, may depend upon local laws under the provisions of which, perhaps, he may not have been liable to taxation. However this may be, is not material. That Mr. Tracy has, during a period, escaped all taxation (except on real estate) may or may not be consistent with his duty as a citizen, but I think it sheds no light upon the question of where he ought, if his property demanded it, to have been assessed.

I must conclude that he is still a citizen of Illinois.

As to the railroad company, it is claimed that although not chartered by or under the laws of this state, yet by the course it has pursued, having an office and transacting its principal business here, and by force of the statute of 1855 (*Laws of 1855, ch. 279*) it is to be deemed not a foreign corporation, in the sense of the acts of congress, under which, according to the decisions of the Supreme Court of the United States, a corporation is to be regarded as a "citizen" of the state from which it derives its char-

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ter, with the view of determining in what courts it may claim to sue and be sued.

Two decisions in this state, one in the superior court, by Justice Robertson, (*N. Y. Piano Co. v. N. H. Steamboat Co.*, 2 *Abb. Pr.*, *N. S.*, 357,) and the other, a special term case, in this court, are cited in support of this proposition. The one in this court is *Stevens v. The Phoenix Insurance Company*, (24 *How. Pr.* 517,) decided by Mr. Justice Allen, in 1863, in Oneida county. In the latter case some reliance seems to have been placed upon the "act to provide for the incorporation of fire insurance companies" in this state, (*Laws of 1853, ch. 466*,) and it is now contended that the same effect is produced by the act of 1855, which is not restricted to insurance companies. The act of 1853, referring exclusively to fire insurance companies, of course, has no application here.

It is not certain that the act of 1855 applies, either. It does not appear when the railroad company was chartered, and the act of 1855 would seem to operate only upon corporations theretofore created, as it provides that "every insurance and other corporation, created by the laws of any other state, doing business in this state, shall, *within thirty days after the passage of this act*, designate some person residing in each county where such corporation transacts business on whom process" may be served. As the designation was to be made within thirty days after the act took effect, which was to be immediately on its passage, it may well be that the statute does not relate to any corporation chartered after its passage, and the plaintiffs, who seek to bring this company under its action, have not shown that the incorporation of this railroad was prior to that time. But I do not mean to let my decision rest upon this ground. I assume for the present purpose that the railroad company is within the operation of the statute.

I am of opinion that the object and the effect of the provisions of the acts of 1853 and 1855, were to prevent

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our citizens being forced to go to another state to bring a suit against a foreign corporation which transacted business within our territory, and to afford them a method of commencing a suit here, against such foreign company; but without in any way cutting off, if indeed that could be done, the right of the foreign body, after being regularly sued in our courts, to remove the litigation, not to another state, but to the courts of the United States.

I do not see that keeping an agent here, either pursuant to a statute or voluntarily, without any legal obligation to do so, upon whom process can be served, works an agreement to concede that the foreign corporation doing so is a citizen of this state, or can estop it from asserting the truth, any more than keeping property within our jurisdiction, by attachment of which the defendant might be compelled to appear, would work a waiver of his right to claim, at the time of entering his appearance, that he was not a citizen of this state. The foreign corporation by doing business and keeping an agent here virtually agrees to admit that it may be regularly brought into court here, but it does not agree that after being regularly sued, it will not, as any other citizen of another state might, exercise its constitutional right to transfer the litigation to the courts of the United States. Certainly there would seem to be no more reason or justice in preventing a foreign corporation which, by its officers, chanced to be temporarily within our jurisdiction, so as to be sued in our courts, from removing the action to the courts of the United States, than there would be in depriving the citizen of another state, who transacted business here, from taking to the latter courts a suit which had been brought against him by personal service of process upon him while on a visit to our state, or in which he appeared to protect his property which had been attached because of his non-residence, and which he could have removed by making his claim to do so at the time he appeared. In each case

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our citizens are saved the annoyance and inconvenience of being obliged to travel to a foreign state to institute the suit, and in each case the defendant would and should have the right to avail himself of the statutes of the United States to remove the litigation to the federal courts.

Whether the cases cited by the plaintiff's counsel are to be understood as resting exclusively upon the statutes of our state above mentioned, or depend upon the theory that, doing business here, a foreign corporation, either with or without a compliance with those statutes, becomes to any extent a citizen of this state, I think they are fallacious; and yet, perhaps, I might have felt called upon not to deviate from them upon my own judgment alone. I confess I do not understand or appreciate how doing business here can affect the citizenship, so to speak, of a corporation, any more than the same circumstance would affect the citizenship or residence of an individual; and it is manifest that an individual may do business here, and yet his citizenship of another state remain unchanged and unaffected by it.

In *Dennistown &c. v. New York and New Haven R. R. Co.*, in the common pleas, (1 *Hilt.* 62,) Judge Daly, whose decision was affirmed by the general term, in a learned and clear opinion held the company to be a citizen of Connecticut, although by a statute of this state, passed in 1846, (*Laws of 1846, p. 231.*) the company was authorized to extend and continue its road through part of this state, and for that purpose to purchase and hold real estate in our territory. It is to be remarked that although that company had its principal office, and transacted most of its business here, no one seems to have supposed that either of those facts or the act of 1855, before alluded to, deprived it of its character as a citizen of Connecticut; but it was claimed that by force of the statute of 1846 it also became a citizen of this state. But Judge Daly held otherwise, saying that "the personalty of the defendants

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as a citizen, within the meaning of the judiciary act of the United States, was established and fixed by the state of Connecticut, which first gave them their corporate being, and for the purpose of this motion they must be regarded and treated as a citizen of that state." Surely if such a statute, of our own state, as that of 1846, regarding that railroad company, and its having an office and doing its principal business here, did not impress upon the New Haven Railroad Company the character of a domestic corporation, the mere transaction of business, and the keeping of an office and agents here, cannot affect the citizenship of the railroad company in this case. But without pursuing these considerations further, I think it sufficient to say, that not only would it appear that the well considered opinion of Judge Daly had been overlooked, but the decisions of Justices Allen and Robertson are entirely irreconcilable with the case of the *Ohio &c. R. R. Co. v. Wheeler*, (1 *Black*, 286,) which was not referred to by either of those judges, and was therefore probably not drawn to their attention, but which, being a decision of the Supreme Court of the United States, and upon a question peculiarly within its jurisdiction, I must, for that reason, if no other, consider paramount authority, and govern myself by it. Two propositions, both necessarily involved in the case, are, with his usual clearness and precision, distinctly asserted by Chief Justice Taney, who delivered the opinion of the court, and they are decisive of the present question. They are, 1st, that a corporation must dwell in the place of its creation, and can have no legal existence out of the bounds of the sovereignty by which it was created; and, 2d, that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing a suit from the jurisdiction of a court of the United States.

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"A suit by or against a corporation in its corporate name," must be regarded "as a suit by or against citizens of the state which created it."

I must therefore hold that the railroad company, defendant here, whatever acts it may have done within our territory, dwells in the place of its creation, and not having been chartered by this state, is a foreign corporation—a citizen of another state, (of what state, since it is not of this, and whether of one or two states, I do not stop to inquire, because wholly immaterial here)—and its citizenship cannot be questioned for the purpose of defeating the jurisdiction of the United States courts over an action brought against it.

It results from these views, that the position of these cases as respects parties is as follows: in one suit, the plaintiff is a citizen of this state; in the other, the plaintiffs are citizens, one of this state, and the others of other states, and in both cases the defendants consist partly of citizens of this and partly of citizens of other states.

This statement of the situation of the parties suffices to show that there can be no removal of the causes, under the judiciary act of 1789.

It does not now need citation of authority to sustain the proposition which, indeed, was scarcely disputed on the argument, that unless all the plaintiffs be citizens of the state in whose court the suit is brought, and all the defendants citizens of a state other than that, the action cannot be removed under that statute.

This brings us to the consideration of the act of 1866. (14 *U. S. Stat. at L.* 306.) A careful examination of that law leads to the conviction that it has no application to the case of Messrs. Fisk, &c., for the reason that that suit is not brought by a "citizen" of this state, and it is only in an action brought by a "citizen" (so far as the present question is concerned) of the state in the courts of which the case is pending, that a removal can ever be demanded.

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The first element necessary as the basis of the application to remove is lacking here. The meaning of the term "citizen," in such statutes, has been long established.

The plaintiffs collectively must, as we have seen, be citizens of this state, or they do not come within the requirement of the statute. If one be not a citizen of this state, although the others are, the action is not brought by a "citizen" of this state. This is so clearly put in the excellent opinion of Judge Daly, which I have before mentioned, that no other authority need be cited. There is nothing in the present act to indicate that congress intended to legislate, as far as the parties plaintiff are concerned, upon the theory that where there were several individuals of different states joined as the party plaintiff any other rule should be applied than that which had long before existed when construing a statute which, in reference to the parties plaintiff, employs precisely the same language as is used in the act of 1866. I think, therefore, that that language should be understood exactly as it was theretofore defined. This view is strengthened by the fact that congress resorted to language showing that it recognized the necessity of doing so, which leaves no doubt that a new rule governs as regards parties defendant. The just inference is, then, that the language of the judiciary act was adhered to in reference to the party plaintiff, because no change of the law was contemplated or desired, while other phraseology was introduced as to the parties defendant, because a new rule was to be made as to them.

But in Mr. Hatch's suit the difficulty, which I have mentioned, in the way of the removal of the cause, does not exist. Congress might very well have considered that if the action were not exclusively by a citizen of the state where it was brought, there would be no reason for allowing a removal at all, and yet have thought that in a case where the plaintiffs were all citizens of the state in which

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the action was brought, and there were associated with a defendant who was a citizen of that same state, persons who were citizens of another and different state, any such foreigner ought separately, in certain instances, to be allowed the privilege of invoking the federal judiciary. And, in my judgment, that is precisely the effect of the statute under examination. The whole context of the act shows that congress designed to legislate for cases where there were several defendants, comprising citizens of the state in which the action was instituted and citizens of other states. And by this statute it is, substantially, provided that, when an action in a state court is brought by a citizen of that state, against a citizen of the same state in conjunction with citizens of other states, any defendant who is a citizen of the other state may, in certain cases, transfer the litigation to the United States courts, so far as it affects him. Now, in the suit of Mr. Hatch, all the requirements thus described exist.

The action is by a citizen of this state against another citizen of this state and citizens of other states. What else, then, must appear, before the defendant, who is a citizen of another state, can claim to remove the litigation?

1st. The matter in dispute must exceed the sum of \$500, exclusive of costs. With great deference to the distinguished counsel for Mr. Hatch, I think the cases relied upon by him to sustain his position that the present action does not fall within that description, have no analogy to this litigation. They did not concern property at all. This does bear upon property and upon property of enormous value.

2d. The statute then provides that if the suit be brought for the purpose of restraining or enjoining the person not a citizen, *or*, if there can be a final disposition of the controversy as respects him, without the presence of the other defendants, then the citizen of the foreign state may remove the cause, "*as against him*," to the United States

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courts. Of course it is agreed that this action is brought to restrain Mr. Tracy and the railroad company. Must it also appear that the suit can proceed to a final determination of the controversy, as respects them, without the other defendants?

I think not. The word "or" is disjunctive, and is so used in this statute as to show that congress was providing for two different classes of cases; first, where the suit was to obtain an injunction; and, second, where the presence of the other defendants was not necessary to the determination of the controversy as respects the defendant seeking the change of forum. I cannot say that congress did not consider that restraining a person was of such serious importance as to justify a provision that in every such case, even if it should arrest the litigation, a citizen of another state might require that the action be transferred, if the condition of the parties plaintiff and defendant were as has been previously described. It would clearly be within the constitutional authority of congress, when the plaintiff is a citizen of one state, to deprive the state courts of jurisdiction of any action to which a citizen of another state was a necessary party, whether alone or with others; and therefore it is equally within its power to provide for the removal of such a case after it has been instituted in the state court.

I have nothing to do with the consequences or the embarrassments which may flow from the removal. The responsibility of the legislation does not rest with me; but I am responsible for the construction I give to that legislation; and I am bound to give it a fair and just one, and not to resort to ingenious and refined theories and unusual interpretations of words which are of common use, and of sentences which are of ordinary import, for the purpose of evading or defeating what congress may have, perhaps unwisely, attempted.

Mr. Tracy and the railroad company are within the pro-

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visions of the statute of 1866, in the suit brought by Mr. Hatch, and so far as relates to them, and to that extent only, the action must be removed to the United States courts pursuant to their petition; and when so removed it is by the statute "to proceed, in the United States court, in the same manner as if it had been brought there by original process."

I only mention this for the purpose of saying that that portion of the section does not bear upon the question of removal, and does not furnish any guide as to the *cases* which are to be removed. It only prescribes the practice which is to govern the proceedings in the action after its removal, viz., the same practice which prevails in actions originally brought in the courts of the United States. If it be said that the severance of the suit will prevent any efficient litigation and leave the plaintiff without remedy—as to which I express no opinion—I have only to answer that that misfortune proceeds from the exercise of the right of the United States to claim exclusive jurisdiction of actions between citizens of different states, and must be borne like any other consequence resulting from the constitutional exercise of sovereign will. The power to produce that effect exists, and if the exercise of it has so resulted, the courts cannot help it. It is of far less importance that the plaintiff should lose his remedy than that the courts should attempt willfully to disregard and overthrow the constitutionally exercised power of legislation.

Respecting the act of 1867, (14 *U. S. Stat. at L.* 558,) very few remarks will be necessary.

I do not find any thing inconsistent between this statute and that of 1866, and as there are no repealing words, I think the amendment is but an addition to the latter act. But I am of opinion that this statute (1867) has no bearing upon either of the cases before me. The act says that "where a suit is pending or may hereafter be brought

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in any state court in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," &c. This, I think, is no more than saying, "if a suit be brought by a citizen of the state in the court of which the action is commenced against a citizen of another state." Both sentences contain the same idea, and nothing else, differently expressed. That being understood, there is no difficulty in determining that the statute has no application to the present cases. It has been seen that when congress, as in the act of 1866, as respects defendants, designed to provide for cases where the parties were composed of several persons, citizens of different states, phraseology was used clearly evincing the intent; and therefore when, subsequently, congress employs language which had long obtained a fixed and known interpretation, there is no reason to suppose that any other meaning was sought to be conveyed than that which the courts had theretofore given to those expressions. Hence, as the terms used in this act, both as respects the party plaintiff and the party defendant, were well understood to mean that the individuals constituting such party plaintiff should all be citizens of the state in which the action was brought, and also that the individuals composing such party defendant should all be citizens of some state other than that in which the suit was commenced, and that both of those conditions of parties plaintiff and defendant should coexist to justify the removal of the action, the same construction must now be given to this statute and the same rule must obtain under it. And as the fact, as to the parties, does not bring either of these cases within that rule, I think no removal can be had under this statute.

I would only add, that it seems to me not unreasonable or unlikely that congress, when it provided absolutely for the removal of a cause upon an affidavit, resting solely on the conscience of the affiant, should have said that it

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would not listen to the suggestion that prejudice or local influence would prevent justice in a state court, unless all the parties on the one side were citizens of that state and all the parties on the other side were citizens of other states, and therefore that it would permit this novel proceeding only when that condition of the parties litigant existed. If it be said that when the parties were thus situated a removal might have been had under the judiciary act, and that therefore this legislation was unnecessary, if this construction of the statute be correct; the answer is, that it is a misapprehension, because the statute as thus construed provides for two matters, which congress probably thought worthy of attention, not covered by the judiciary act, viz: 1st. The removal of a case at the instance of the plaintiff. 2d. The removal of a case *at any time before final hearing or trial*, instead of limiting it to the time of entering appearance in the action, as prescribed in the act of 1789.

The magnitude of the litigation, and the grave consequences to the parties, of an erroneous decision of these questions, induced me to hear all the eminent counsel concerned, and without any restriction as to time. And impressed with the solemnity and importance of the duty devolved upon me, I have brought all the power I possess to the calm, patient and candid investigation of the subject, with the sole object of reaching an accurate conclusion. Having done this, nothing remains for me, but to declare as the result of my reflections, that the prayer of the petitioners, in the case of Messrs. Fisk and others, must be denied; and that in the case of Mr. Hatch, so far as the petition seeks the removal of the action as regards Mr. Tracy and the Chicago, Rock Island and Pacific Railroad Company, it must be granted, but to that extent only, and in other respects it must be refused.

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JAMES H. BUCKLIN *vs.* HELEN M. CHAPIN, adm'x, &c.

In order to confer jurisdiction on the court, under the section of the Revised Statutes providing that if an executor or administrator doubt the justice of any claim presented to him, he may enter into an agreement in writing, with the claimant, to refer the matter to referees, to be approved by the surrogate, and that upon filing such agreement and approval with the clerk of the Supreme Court, a rule shall be entered by the clerk, referring the matter to the persons so selected, it is not necessary that there should be a literal compliance with its terms; a substantial compliance is enough.

To give jurisdiction, there must be: 1. An agreement in writing to refer; 2. The persons agreed on as referees must be approved by the surrogate; 3. The agreement and approval must be filed; 4. A rule referring the claim to the persons indicated must be entered by the clerk of the Supreme Court.

A surrogate made and signed an order in writing, entitled in his court, reciting that the claim of the plaintiff against the estate of C. had been presented to the administratrix and rejected, and the parties had agreed to a reference; and directing that three persons named be and they were thereby appointed referees to hear and determine said claim of the plaintiff; and that such order be entered with the clerk of the county. At the foot of this order was the following consent, signed by the attorneys of the respective parties: "We assent to the above order, and consent that the same be entered." The order, with the consent attached, was then filed by the county clerk and a memorandum of the filing indorsed thereon.

Held, 1. That the order and consent, taken together, were a sufficient agreement in writing to refer.

2. That there was sufficient evidence that the surrogate approved of the persons named as referees.

3. That the statutory requirement as to the filing of an agreement to refer, was complied with.

4. That if the order referring the claim to the persons named as referees was not entered by the clerk, it could be done *nunc pro tunc*, and should be so entered, to prevent a failure of jurisdiction.

5. That even assuming that the papers were not in conformity to the statute, still the referees acquired jurisdiction to hear, try and determine the matters in controversy between the parties; and that their report was legal and binding on the parties, until it was set aside by the court in some proceeding properly instituted for that purpose.

6. That the Supreme Court had jurisdiction over the claims which were submitted to the referees; in other words, that it had jurisdiction of the subject matter. That by the voluntary consent and appearance of the parties jurisdiction of their persons was obtained; and whenever jurisdiction over both is acquired, the proceedings thereafter are valid, however irregular they may be.

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7. That the appearance before the referees, the trial of the claim presented, and report thereon, were all that were necessary to justify the entry of a judgment; that all the preliminary steps might be supplied *nunc pro tunc*.

THE defendant is the administratrix of her husband, E. G. Chapin, deceased, having been appointed by the surrogate of the county of Herkimer, in December, 1861. The plaintiff, claiming to be a creditor of the intestate, presented to the agent of the defendant, on the 17th December, 1862, an account, by which a balance of \$715.59 was claimed to be due. This account was not brought to the knowledge of the defendant until April, 1866, when she served a notice on the plaintiff that it was rejected. On the 11th of May, 1866, the following order was drawn up and signed by the surrogate:

“Surrogate Court, Herkimer County.—In the matter of the claim of James H. Bucklin against the estate of Edmund G. Chapin.

The claim of James H. Bucklin having been presented to the administratrix and rejected, and the parties agreeing to a reference, it is ordered by the surrogate that Hon. Amos H. Prescott, Martin W. Priest, Esq., and William T. Wheeler, Esq., be and they are hereby appointed referees to hear and determine the claim of said Bucklin; and let this order be entered with the clerk of Herkimer county.

VOLNEY OWEN, Surrogate.”

To this order was attached the following consent, signed by the attorneys for the plaintiff and defendant, respectively, viz:

“We assent to the above order, and consent that the same be entered. May 11, 1866.”

This order was filed by the clerk of Herkimer county, on the day of its date, with the consent annexed thereto, and the fact of filing indorsed by him.

The parties appeared before the referees named in the order, who, after having heard their proofs and allegations, made a report, entitled in the Supreme Court and

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addressed to it, by which they found due to the plaintiff \$714.59, for which sum they ordered judgment. Judgment being entered accordingly, the defendant appealed to the general term. When the appeal was brought on for argument the court refused to hear it, and required the parties to move, at a special term, to confirm the report, and for judgment; to the end that from the judgment, if one should be directed, an appeal might be taken. The plaintiff's counsel, instead of conforming to the direction thus given, moved, at a special term held in Syracuse in July, 1867, to set aside the appeal, exceptions and notice of appeal, taken and made by the defendant, on the ground that there was no agreement in writing to refer the claim to the persons named as referees, nor any approval of such persons by the surrogate, by reason whereof the hearing and decision of the referees became and was an arbitration, and not a reference, under the statute. The court granted the motion, and from the order granting it the defendant appealed.

Francis Kernan, for the appellant.

George A. Harris, for the respondent.

By the Court, MULLIN, J. The Revised Statutes (vol. 3, 5th ed. 175, § 41) provide, if an executor or administrator doubt the justice of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter to one or three referees, to be approved by the surrogate; and upon filing such agreement and approval with the clerk of the Supreme Court, a rule shall be entered by the clerk, referring the matter to the persons so selected. The next section clothes the referees with the same powers as if the reference was in an action in the court in which the order of reference is entered.

In order to confer jurisdiction on the court under this statute, it is not necessary there should be a literal compliance with its terms; a substantial compliance is enough.

To give jurisdiction, there must be:

1st. An agreement in writing, to refer. There is no formal agreement, signed by the parties, but the order signed by the surrogate recites the presentation of the claim, and that the parties have agreed on a reference. The attorneys of the parties sign a writing, at the foot of the order, that they, the parties, consent to the order. Laying out of view the presumption that a formal agreement was prepared, I think the order and consent, taken together, are an agreement in writing to refer.

If the attorney for the administratrix had made an offer in writing to refer, and the attorney had signed and delivered to her a written acceptance of the offer, it would not be contended but that the two papers would constitute a valid agreement. Suppose the surrogate had written, the parties have agreed to refer the claim in dispute to these men as referees, naming them, and the attorneys had written beneath it, "we hereby agree to the above reference;" can it be doubted but that the two papers, taken together, would have been an agreement under the statute? This is exactly what has been done. The paper written by the surrogate takes the form of an order, instead of a mere statement that the parties had agreed to refer.

2d. The persons agreed on as referees must be approved by the surrogate.

There can be no question but that the surrogate approved the men selected. No more conclusive evidence of approval could be given.

3d. The agreement and approval must be filed.

They were filed, and the fact of filing is noted on the paper.

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4th. A rule referring the claim to the persons indicated must be entered by the clerk of the Supreme Court.

The agreement takes the form of an order. It was filed with one of the clerks of the Supreme Court; and the order must be entered in that court, as there is no other court having jurisdiction to make the order.

Entitling the order in the surrogate's court could not impair the regularity of the order. The county clerk was not the clerk of the surrogate's court; he could not enter it, therefore, in that court, and the entry could have effect only in the Supreme Court, whose clerk he was, and in which court it could be regularly entered.

But assuming that it was never entered by the clerk, it can be done *nunc pro tunc*, and should be so entered, to prevent a failure of jurisdiction.

But if it must be assumed that the papers are not in conformity to the statute, I am nevertheless satisfied that the referees acquired jurisdiction to hear, try and determine the matters in controversy between the parties, and that their report is legal and binding on the parties, until it is set aside by the court, in some proceeding properly instituted for that purpose.

The Supreme Court has jurisdiction over the claims which were submitted to the referees; in other words, it has jurisdiction of the subject matter. By the voluntary consent and appearance of the parties, jurisdiction of their persons was obtained; and when jurisdiction over both is acquired, the proceedings thereafter are valid, however irregular they may be.

Section 270 of the Code provides that all or any of the issues in an action may be referred upon the written consent of the parties. Under the old practice, the reference of the issues in an action not referable, or to a greater or less number than the statute prescribed, was a discontinuance of the action, and the reference became an arbitration, merely. It will be seen that a consent *in writing* is

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necessary to refer issues, in all cases in which the court may not compel a reference; and hence a written consent is just as necessary to a valid reference under the Code as a valid reference under the statute relating to the reference of claims against executors and administrators. It was held in *Leycroft v. Fowler*, (7 How. Pr. Rep. 259,) that the consent to refer under section 270 of the Code may be written by the parties, or their attorneys, or by the clerk entering their consent in his minutes, or by the referees in their minutes, consent being given thereto. And the parties might waive any entry other than that made by the referees on their minutes. In that case, after appearing before the two referees to whom the issues had been referred, a third was added, and the only entry was by the referees in their minutes. The same was held in *Kcator v. Ulster Plank Road Co.*, (7 How. Pr. 41.) In that case there was no writing; the agreement to refer was in open court; and it was held the requirement of the statute, as to consent in writing, could be and was waived.

As to the power to waive the requirement, see *Baker v. Braman*, (6 Hill, 47;) *Lee v. Tillotson*, (24 Wend. 337;) *People v. Murray*, (5 Hill, 468;) and *Embury v. Conner*, (3 N. Y. Rep. 511.)

In *Harris v. Bradshaw*, (18 John. 26,) a rule of reference was entered by consent, in an action of assumpsit, but the trial did not require the examination of a long account. The cause was tried, a report made and sued upon as an award. The court held the reference regular, and said the consent of the parties to a reference concluded them from objecting that the action was not referable. It being assumpsit, may have involved long accounts. The reference was an admission that the case was within the statute, and the court would not listen to an objection to the contrary.

Proceeding upon a reference is a waiver of all objec-

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tion because of irregularities. (*Garcie v. Sheldon*, 3 Barb. 232.) In *Bonner v. McPhail*, (31 Barb. 106,) the action was slander, for words spoken in reference to the evidence of a plaintiff in an action tried before a referee. No order of reference had been entered, nor was any entered until some two months after the trial, when one was entered *nunc pro tunc*. It was held by the general term, in the second district, that the referee had no power to administer oaths, but that the omission to obtain the order of reference before the referee proceeded to hear the cause, was an irregularity which the parties might waive or correct, so as to give effect to the report.

In *Comstock v. Olmstead*, (6 How. Pr. 77,) Judge Gridley decided that when a claim was presented against an estate and rejected, and an agreement to refer entered into, but it was never filed nor rule entered, the court did not become possessed of the case; and he cites in support of the position, *Robert v. Ditmas*, (7 Wend. 525,) in which Savage, Ch. J., says there must be an agreement in writing filed, as the foundation of the rule to refer; there must be a report; and the report must be confirmed. It will be seen, by reference to the opinion of the chief justice, that he was not speaking, nor was he called to speak, as to whether compliance with each of these requirements was essential to give validity to the report. He spoke of them as he would of the service of process, joining issue and serving notice of trial as necessary to a judgment.

But while the general rule is that each step is necessary, yet it does not follow that some of them may not be waived. I can see no more necessity for an agreement in writing and rule of reference in the class of cases under consideration than under section 270 of the Code, already referred to. If they may be dispensed with in the one case, so may they in the other.

The appearance before the referees, the trial of the claim presented, and report thereon, are all that are neces-

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sary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*. (1 *Wend.* 314.)

I think the order should be reversed, and the appeal, &c. restored.

Ordered accordingly.

[ONONDAGA GENERAL TERM, April 7, 1868. *Foster, Mullin and Morgan, Justices.*]

SAMUEL ROSENBACK vs. THE SALT SPRINGS NATIONAL BANK.

The act of congress, approved February 25, 1863, entitled "An act to provide a national currency," does not authorize the directors of a bank incorporated under its provisions and in conformity with the act of the legislature of this state, passed March 9, 1865, entitled "An act enabling the banks of this state to become associations for the purpose of banking, under the laws of the United States," to create, by a by-law, a lien in favor of the bank on stock held by stockholders, for the security of debts due by them to the bank.

A by-law declaring that no transfer of the stock of the association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise, if not void because it provides for a forfeiture of stock, is void because, without express authority, it attempts to impose a lien upon its stock.

The power to declare a lien upon stock, by means of a by-law, is not expressly conferred upon the national banking associations, by the act of congress; nor has it been incidentally or impliedly conferred upon them. Yet the lien may exist, if provided for in the articles of association.

THIS was an action to recover of the defendant damages for its refusal to permit the transfer upon its books of eighty-five shares of its capital stock, which stood on its books in the name of one Henry Clay Barnes, and of which the plaintiff had become owner. It was either proved or admitted on the trial that a banking corporation known as the Salt Springs Bank was created in the year 1852 under the general banking law of this state. On the

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1st day of July, 1865, the said Salt Springs Bank become incorporated under the provisions of the act of congress of the United States, approved February 25, 1863, entitled, "An act to provide a national currency," and the several acts amendatory thereof, and in conformity with the provisions of an act of the legislature of this state, passed March 9, 1865, entitled "An act enabling the banks of this state to become associations for the purpose of banking under the laws of the United States."

On the 1st day of July, 1865, Ira Gage Barnes was the owner of 270 shares of the stock of the Salt Springs Bank, of the value of \$100 per share, and for which certificates had been issued to him. On said last mentioned stock the defendant issued to him eighty-five shares of its stock in lieu of the same number of the Salt Springs Bank, which he surrendered on the receipt of the certificates issued by the defendant. On the 1st February, 1866, Ira Gage Barnes transferred these eighty-five shares to Henry Clay Barnes, and they have never been held or owned by said Ira since. After Henry Clay Barnes become owner of said shares he pledged them to Crouse & Co., to secure a loan of \$8000. About the 20th June, 1866, said H. C. Barnes made a loan of \$8000 of the plaintiff, and delivered to him these eighty-five shares as security, having paid the money borrowed of Crouse & Co. The plaintiff sold this stock on the 7th September, 1866, in order to pay the loan and became the purchaser at such sale. The plaintiff caused a demand to be made of the defendant to transfer said stock to the plaintiff, on the 17th July, 1866, and also in the months of August and September of the same year, which was refused. The value of the stock on the 17th July, 1866, was \$105 per share. The defendant was not informed of the several transfers of the stock prior to the 17th July, 1866. On the 20th March, 1866, the defendant discounted a note for \$2000 made by Henry C. Barnes, and indorsed by Ira G. Barnes, payable forty-five

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days from its date in the city of New York. On the 3d May, 1866, this note was renewed, having the same parties upon it, and payable at the same time and place. This note was presented and protested at maturity, and suit commenced thereon, in which suit judgment was perfected September 1, 1866. On the 10th May, 1866, the defendant discounted a note for \$5000, having the same maker and indorser, and payable sixty days from its date. On the 27th July, 1866, the defendant received from the assignees of H. C. Barnes \$1750, and on the 20th August, 1866, \$700, to apply, and these amounts were applied, on the aforesaid two notes. On the 1st January, 1867, the defendant declared a dividend of four per cent on its capital stock, and that is the only dividend remaining unpaid on the eighty-five shares of stock. The defendant had, prior to the 1st January, 1866, adopted the following by-laws:

“No transfer of the stock of this association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise.”

This by-law was printed on the back of each certificate for stock issued by said defendant. The defendant never consented to the transfer of the stock in question.

The defendant had adopted the following by-law, which was in force at the time of the transfers of their stock in question:

“§ 15. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfer of the stock of the association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise, and certificates of stock shall contain upon them notice of this provision.”

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On the 3d July, 1866, H. C. Barnes become insolvent, and on the 7th Ira G. Barnes was insolvent. The defendant had no security for the notes, unless the stock became such under the by-law aforesaid.

The cause was tried before Justice MORGAN, without a jury, who found the facts, substantially, as above stated; and he held as matter of law that the directors of the defendant had no power to pass the by-law in question, and that said by-law was in violation of that clause of the act of congress relating to the national banks, which forbade them to make any loan or discount on the security of the shares of its capital stock.

Judgment was ordered in favor of the plaintiff for the value of the stock, and from that judgment this appeal was brought.

W. J. Wallace, for the appellant. I. The by-law of the bank does not contravene the law under which the bank was organized, and is within the incidental legislative powers of moneyed corporations. 1. The by-law is authorized by the "National Currency Act," and not inconsistent with any of its provisions. The act of 1864, with amendments of 1865, provides that the directors of any association formed under that act "shall have power to define and regulate by by-laws the manner in which its stock shall be transferred." (§ 8.) The act also provides that "the capital stock of any association formed under this act shall be deemed personal property and transferable on the books of the association, in such manner as may be prescribed in the by-laws or articles of association," and "every shareholder shall succeed to all the rights and liabilities of the prior holder of such shares." (§ 12.) The act thus recognizes certain "liabilities" which may be imposed by by-laws in regard to the transfer of stock. The foregoing are the only sections of the act in regard to by-laws and the transfer of stock. 2. The by-law is a

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reasonable one, and within the implied powers incident to the management of the affairs of moneyed corporations. Among these powers is the right to provide against transfers of stock by stockholders pecuniarily liable to the corporation. (*Leggett v. Bank of Sing Sing*, 24 N. Y. Rep. 283. *Angell on Corporations*, § 355. 12 Ohio R., N. S. 601 *McDowell v. Bank of Wilmington*, 1 Harr. Del. R. 27.)

II. The discounting by the defendant of the notes of Barnes was not, by reason of the existence of the by-law, a discount on the security of the shares of its own stock within the prohibition of section 35 of the national currency act. 1. It is conceded, as a matter of fact, that upon the discount no arrangement was made for any security but the notes themselves. 2. The intent of section 35 is simply to prevent discounts upon securities which would be worthless as assets in case of insolvency of the banks, and this case is not within the evil provided against. 3. By no reasonable construction can it be held that an ordinary discount, because incidentally affected by the by-law, is made upon the security of the by-law. More especially should such a construction be condemned when it renders an act illegal which is capable of an innocent interpretation. The by-law was enacted to protect the bank against other liabilities of stockholders than those arising from loans, such as unpaid assessments on the stock, &c. Its operation on a loan is merely incidental. 4. The discount was not on the security of the stock, because no "security," in the legal or ordinary sense of the word, was given to the bank by the by-law. That cannot be termed a security for a loan which provides no way to enforce the payment of the loan. The by-law gives the bank no right of affirmative action to collect the loan from the stock. It does not give to the bank in regard to the stock any equity superior to that of the general creditors of the stockholder. The stock can not only be retained by the indebted stockholder, but its transfer can be com-

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pelled by proceedings by its creditors, notwithstanding the by-law. The by-law only provides against a transfer by the stockholder himself, and it is no protection to the bank in a proceeding against him *in invitum*. (15 *John*. 278. 1 *Atk. R.* 219. 8 *T. R.* 57.)

III. If by any construction the discount, under the circumstances, was in contravention of the act, then Barnes was a party *in pari delicto*. The plaintiff, having no greater rights than Barnes, cannot ask the intervention of the court, and the rule *potior conditio defendantis* applies. It is not alone in cases *malum in se* that this rule applies, but it is equally applicable to acts contravening provisions imposed in restraint of corporations. (*DeGroot v. Van Duzer*, 20 *Wend.* 390. *East Anglian Railway Co. v. Eastern Co. R. Co.*, 7 *Eng. Law and Eq. Rep.* 505. *McGregor v. Official Manager of Deal and D. R. Co.*, 16 *id.* 505. *Mayor of Norwich v. Norfolk R. Co.*, 30 *id.* 120-144.)

IV. Barnes having no right to insist upon a transfer of the stock, his assignee, though for value, has no better rights, and is subject to the same disabilities. (*Stebbins v. Phenix Ins. Co.*, 3 *Paige*, 350. *Commercial Bank of Buffalo v. Kortright*, 22 *Wend.* 348. *Leggett v. Bank of Sing Sing*, 24 *N. Y. Rep.* 283-293.)

William C. Ruger, for the respondent. I. In the absence of the by-law in question, the refusal of the defendant to transfer the said stock upon the books of the bank and issue new scrip therefor, was a conversion of the stock entitling the plaintiff to bring and maintain this action. This was held in this state in *Leggett v. The Bank of Sing Sing*, (24 *N. Y. Rep.* 292,) and *Arnold v. The Suffolk Bank*, (27 *Barb.* 424.) The delivery of the scrip indorsed by the shareholder in blank upon the back thereof is a valid transfer of the stock, and authorizes any subsequent holder to write out the assignment over the name. (22 *Wend.* 348. 20 *id.* 91. 4 *Duer*, 1 to 20.) A transfer without

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registry is good, and passes the title. (2 *Cowen*, 770. 8 *id.* 398.)

II. The existence of the by-law in question did not create a lien in favor of the defendant upon said stock for the amount of Ira Gage Barnes' indebtedness to the defendant, for the reason that the same was in conflict with, and is prohibited by, the 35th section of the general banking law, under which the defendant was organized. The section is as follows: "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." And stock thus acquired shall be sold within six months, or a receiver may be appointed, &c. It will be seen that the defendant is hereby not only prohibited from making any loan upon the security of its own shares, but also from being the purchaser or holder of such shares, unless such security or purchase is necessary to prevent loss upon a debt contracted previous to such purchase.

III. The by-law in question furnishes no defense to this action, for the reason that the board of directors of the defendant had no power to confiscate or forfeit the stock of their shareholders for the non-payment of a debt. In all the cases arising in this state where a lien has been created upon stock for the debt of a shareholder, in favor of a bank, the provision whereby it was done was incorporated in the articles of association signed by the shareholder. (24 *N. Y. Rep.* 284. 27 *Barb.* 424. 3 *Paige*, 361.) It was thus, by virtue of an express contract between the parties to the transaction, created a lien. The power to make by-laws is conferred by section 8 of the laws of congress, passed June 3, 1864, and is to the effect that they "may define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in

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which its stock shall be transferred," &c. By section 12 of the same act, the "stock is made personal property, and is transferred on the books of the bank in such manner as may be prescribed by by-laws. The power conferred upon a corporation to make by-laws, is a power to regulate the internal and domestic affairs of the corporation, but confers no power to affect the rights and liabilities of third persons by by-laws. (19 *John.* 115. 26 *Barb.* 595.) "The declaration that the shares of the association shall be deemed personal property, and transferable on the books of the association in such manner as may be agreed on in the articles of association, refers to the *modus operandi* of transfer, and not to the right of transfer, or to any restrictions upon such right." (24 *N. Y. Rep.* 288, *per Allen, J.*) But this question has been expressly decided in this state. The general power to make by-laws not inconsistent with law, does not authorize a corporation to make by-laws subjecting stock to forfeiture for non-payment of installments; they must have express power to do this. (19 *Wend.* 37.) The statute, act of congress, passed June 3, 1864, section 15, confers upon corporations formed under that act the power to forfeit stock for non-payment of installments, and that is the only case in which a forfeiture of stock is authorized.

IV. The by-law in question furnishes no defense to this action, for the reason that by its terms it does not apply to the stock in question. This stock was transferred on the 1st day of February, 1866, and Ira Gage Barnes did not become indebted to the bank until in March and May following; so that at the time of the transfer he was not a debtor of the bank.

By the Court, MULLIN, J. By section 192 of the general banking law of this state, it was provided that the shares of said association should be deemed personal property, be transferable on the books of the association in such

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manner as might be agreed on in the articles of association, and every person becoming a shareholder by such transfer should, in proportion to his shares, succeed to all the rights and liabilities of prior shareholders.

The associations created under said act were, for almost all purposes, corporations, and the general provisions of the Revised Statutes relating to corporations applied to them, and one of the provisions thus applied empowered such associations to make by-laws not inconsistent with any existing law, for the management of their property, the regulation of their affairs, and the transfer of their stock.

It was held in *The Bank of Attica v. The Manufacturers' and Traders' Bank*, (20 N. Y. Rep. 501,) that a delegation by the articles of association to the directors, of the general powers of the association and the management of its stock, does not authorize a by-law subjecting the stock to a lien in favor of the bank for the indebtedness of the stockholders; and it was further held, that a purchaser for value, without notice of such a by-law, had an equitable title to the stock, free from the lien of the bank.

But when the articles of association provide that the shares of its stock shall not be transferable until the shareholder shall discharge all debts due by him to the association, the association thereby acquires a valid lien on the stock as against an assignee who takes it with knowledge thereof. (*Leggett v. The Bank of Sing Sing*, 24 N. Y. Rep. 283.)

It was held in *Arnold v. The Suffolk Bank*, (27 Barb. 424,) that when the articles of association provided for a lien upon stock until the shareholder's debt to the bank was paid, such a lien was valid, and bound the stock.

If the case in hand had arisen under the general banking law of the state, it cannot require argument to show that the defendant had no lien on the plaintiff's stock. The lien insisted on is created by a by-law, and not by

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the articles of association; so that within the principles of the cases cited, there was no valid lien upon the stock ever created.

The defendant is created under the act of congress, and not under the state law; and it remains to inquire whether the provisions of that act authorize the directors to create a lien in favor of the bank on the stock held by the stockholders for the security of debts due by them to the bank.

The first act passed by congress providing for the creation of banking associations was passed in 1863, and approved on the 25th February in that year. That act was repealed in 1864, and another act passed, providing for the incorporation of these associations, in 1864, and was approved June 3d of that year.

It will not be necessary to refer to any of the provisions of the former act, except section 36, which provided that no shareholder should have power to sell or transfer any share of stock held in his own right so long as he should be liable, either as principal debtor, surety or otherwise, to the association for any debt which should have become due and remain unpaid; nor should any such stockholder receive any dividend so long as such liabilities should continue; and no stock should be transferred without the consent of a majority of the directors, while the holder thereof was indebted to the association. This clause was not incorporated in the new act, and hence the power to subject stock to a lien in favor of the bank, as security for debts due from the person holding it, to the bank, must be looked for in some other clause or section of the act.

The 5th section of the act of 1864 provided that associations for carrying on the business of banking may be formed by any number of persons, not less than five, who shall enter into articles of association which shall specify in general terms the object for which the association is

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formed, and may contain any other provision, not inconsistent with the provisions of said act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.

Section 8 provides that the associations formed under said act shall be bodies corporate, and shall have a corporate seal, succession, make contracts, sue and be sued as fully as natural persons, elect or appoint officers, and exercise such incidental powers as shall be necessary to carry on the business of banking. The directors have power to define and regulate by by-laws not inconsistent with said act, the manner in which its stock shall be transferred, its officers elected or appointed, its property transferred, its general business conducted, and all the privileges granted by said act exercised and enjoyed.

By section 12 the capital stock is declared to be personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares.

The more important provisions of the act of 1864, above cited, are substantially the same as those contained in the banking law of our state. And in the absence of any construction of those provisions by the courts of the United States, we must follow that of our own courts.

Applying to these provisions the principles settled by our courts, we must hold:

1st. That unless the act of congress or the articles of association expressly authorize the directors of a banking association by a by-law to make the stock of any of its stockholders subject to a lien in favor of the bank, as security for a debt due by him to the bank, no such lien can be thus created.

2d. No such power is expressly given; and that it was

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not intended to be given is fairly inferable from the omission to re-enact, in the act of 1864, the clause of the act of 1863, which expressly gave the bank such a lien.

The general power to pass by-laws does not embrace that of creating liens and through the lien a forfeiture. The lien would be worthless unless it could be enforced, and the necessary consequence of enforcing it is a sale of this stock and consequent loss of it to the owner.

Now corporations cannot pass by-laws which impose a forfeiture. (*See cases cited in the opinion of the court, in the matter of the Long Island R. R. Co., 19 Wend. 37.*) In that case the railroad company had, as I infer from the opinion, passed a by-law declaring forfeited the stock of such of its stockholders as should, after notice, fail to pay installments due upon such shares. The court held that, in the absence of express authority to pass such a by-law, none existed, and the forfeiture was void.

But if I am wrong in supposing that the by-law of the defendant is void because it provides for a forfeiture of the plaintiff's stock, it is nevertheless void because without express authority it attempts to impose a lien upon its stock. (*Bank of Attica v. The Manufacturers' Bank, cited supra.*) It is said in that case, and in *Leggett v. Bank of Sing Sing, (supra,)* that had the power to impose a lien been contained in the articles of association, it would have been valid. We do not know what is contained in the articles of association, as they are not before us, but it is reasonable to infer that if they contained such a power they would have been produced.

The power to create a lien not being expressly conferred by the act of congress nor by the articles of association, it only remains to inquire whether it is impliedly conferred in any of these provisions of the act of congress which confer other or different powers on the associations than is conferred by the general banking law of the state. Before entering upon the inquiry, it may be proper to

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ascertain the intentions of the state and national legislatures in framing the laws under which these banking associations were and are created, and the powers which it was intended to confer upon them.

The legislature that passed the general banking law in 1838 were met, at the very outset of the efforts to establish a new system of banking, by constitutional provisions (§ 9 of art. 3 of the Constitution of 1822) requiring the assent of two-thirds of all the members elected to the legislature to every law creating, continuing or altering a corporation. A majority only could be procured; hence it became indispensable that an act which was to bring into being an indefinite number of associations for banking purposes should be so framed as to deprive them, as far as possible, of the powers usually conferred on corporations, and yet clothe them with such powers as were necessary to enable them to perform the duties which must necessarily devolve on banking institutions. Hence we find that the act does not in terms confer on the associations to be created under it any of the powers of corporations. It gives them only such powers as are absolutely necessary to carry on their business, and as necessarily incident to it they become clothed with others, and indeed with all the usual powers belonging to corporations. In a word, the act was a mere evasion of the constitution. The Supreme Court uniformly held these associations to be corporations. But the Court of Errors, pressed by the mischiefs which would result from declaring them illegal, held them not to be corporations, withing the meaning of the constitution. Nevertheless, that court held them to be corporations whenever a question as to their character was before it. As the act was silent as to the powers which it was intended that these associations should exercise, and as the articles of association which the stockholders were required to file in order to bring the association into existence, might contain any provision

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not inconsistent with the constitution or laws that those framing them might desire to insert therein, these articles, instead of the act, became the charter, and the courts held they might lawfully exercise powers given by the articles, although not enumerated in the general act. It was doubtless on this ground that the Court of Appeals held that a lien on stock was created in favor of the association when the articles provided for it. The articles being in effect a contract between the stockholders, it was right to hold them bound thereby, although the law creating the corporation conferred on them no power to make any such contract.

Congress encountered no constitutional obstacle in its way in the passage of the law under which the national banking institutions are created. It intended to create institutions substantially like those created under our banking law. The act of congress of 1863 was, in all its national provisions, like ours, except that its 8th section expressly conferred upon the associations certain powers usually conferred on corporations, such as the power to have a common seal, succession, &c.

The 5th section of the act of 1864 permitted those who filed articles of association to incorporate therein, in addition to the matters required by the act of 1863, any other provisions, not inconsistent with the provisions of said act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. No such provision as this was contained in our banking law, and could not be, without subjecting the act, instantly, to the constitutional prohibition.

It cannot be denied, in view of the provisions of the acts of congress above referred to, but that congress intended to create, and has created, bodies corporate, nor but that those bodies are clothed not only with the powers expressly conferred, but also with such others as are necessary to carry into effect those which are thus conferred, and to

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them may, perhaps, be added certain incidental powers which belonged at common law to all corporations, unless expressly withheld by their charter.

I come now to the question suggested above, viz., whether the power to declare a lien upon stock by means of a by-law has been incidentally or impliedly conferred on the national banking associations.

The 5th section of the act of 1864 authorized, as I have shown, the incorporation into the articles of association of any other provisions not inconsistent with said act, which the association might see fit to adopt for the regulation of its business and the conduct of its affairs. This provision is broad enough to authorize the creation of a lien in favor of a bank upon the stock of its debtors. According to the case of *Leggett v. The Bank of Sing Sing*, such a lien might be created by the articles without any provision authorizing it in the general law. But the articles contain no such authority, and hence the provisions of the 5th section do not aid the defendant.

The 8th section provides that the board of directors shall have power to define and regulate by by-laws, not inconsistent with the said act, the manner in which its stock shall be transferred, its general business conducted, and all the privileges granted by the act exercised and enjoyed. The authority to regulate the manner of transferring the stock does not embrace the power to create a lien upon it. If it did, then the state banks would have had the power, as the general banking law conferred the same power on the directors of the association. But it is settled that they acquired no such power, under this clause. Indeed, the clause under consideration was never designed to confer any such authority. It is of the highest importance that a corporation should know who are its stockholders, in order that they may be able to pay dividends to the real owner of the stock, but, also that they may

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know who are entitled to vote at elections, hold the office of directors and contribute in case of loss. These ends can only be attained by enabling the corporation to regulate the manner of transferring the stock. This was the sole object of the clause of the act to which I have referred.

The same section declares that the by-laws may regulate the manner in which its *general business shall be conducted*. Argument cannot be required to show that this clause does not embrace the power to create a lien on stock. Such a power has no connection with the general business of the corporation. It applies to a very limited class of cases, and to a very small share of the business of the bank, if its affairs are conducted in conformity to the general law.

The section next authorizes by-laws to regulate the manner in which all privileges granted by the act shall be exercised and enjoyed. This does not contain the grant of any new power, except the power to make by-laws in relation to powers expressly granted by the act, or powers which are necessary to carry into effect such express powers, as the power to create a lien on stock has not been conferred by any of the other provisions of the statute. This clause does not profess to authorize a by-law to be made in reference to it.

We have, then—1st. The act of congress creating these associations, almost identical with an act of our own legislature, which last mentioned act our own courts have held does not confer on these associations the power to create by by-law a lien on the stock of a stockholder indebted to it. 2d. A provision in the act of congress of 1863, declaring such a lien is repealed and omitted from the subsequent act of 1864. 3d. No such power is expressly conferred in the act of 1864, nor does it contain any provision which, fairly construed, confers any such power. 4th. The by-law would tend to work a forfeiture, and is

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not, therefore, such an one as the association could adopt under the power which corporations have at common law to pass by-laws.

For these reasons, I am of the opinion that the by-law creating or declaring the lien is void, and furnishes no justification to the defendant for refusing to transfer to the plaintiff the stock in question.

It is not necessary to examine the other question presented by this appeal, viz., whether, if such a lien existed, a loan to a stockholder would not be a loan on the security of the shares of its own stock, and therefore a violation of the 35th section of the act of 1864, which forbade such a loan.

If the authority was conferred upon the association to declare such a lien by by-law, it would not be in violation of section 35. That section, as well as the one conferring the authority to declare the lien, must, in that event, be so construed as that both shall have effect; and as that could only be done by applying section 35 to express pledges of stock as security for loans, the section would be so construed. Congress must have intended that the two provisions could stand, as in the act of 1863 it expressly gave the bank a lien on the stock for debts due by the stockholders, but forbade them to loan on the security of their own stock. I do not perceive, therefore, that any light can be drawn from section 35.

If I was called on to construe that section separated from all other provisions of the act, I should be of opinion that a loan by an association upon shares of its own stock as security, however a lien upon it as security might be obtained, was forbidden. But as it has been held that such a lien may be obtained if provided for in the articles of association, it would follow only that such a lien cannot be created by by-law, and the section must, therefore, be

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construed as if it contained the exception of liens created by the articles of association. For these reasons, I am in favor of affirming the judgment.

Judgment affirmed.(a)

[ONONDAGA GENERAL TERM, April 7, 1868. *Foster, Mullin and Morgan*, Justices.]

(a) The reporter has been furnished with a note of another case involving the same question discussed in the foregoing opinion, which was decided by the same court at the general term in June, 1869:

LUTHER H. CONKLIN and DEWITT C. PECK, assignees of James S. Chandler, respondents, *vs.* THE SECOND NATIONAL BANK, appellant.

In this case the indebtedness against Chandler did not arise out of loans or discounts made upon the security of his bank stock, but was for a balance on an account current, and mostly for moneys received by Chandler, who was a banker, upon checks, drafts and notes sent to him for collection. The defendant's bank claimed to have a lien upon his stock as security for this indebtedness, by force of a by-law of the directors creating such lien, notice of which was indorsed upon the certificates of stock.

MORGAN, J. The decision in *Rosenback v. The Salt Springs National Bank* seems to control this case. The opinion, in which I concurred, placed the judgment solely upon the ground that the directors had no authority to create a lien upon the capital stock for debts due from the stockholders to the corporation, unless such authority was expressly conferred by the articles of association. In the case at bar, the articles of association give no such authority to the directors, nor is any such power conferred upon them by the act of congress. The defendant's bank claims to hold Chandler's stock as security for his indebtedness, by force of a by-law of the directors, creating a lien, of which notice is indorsed on the certificates of stock. This claim cannot be distinguished from that set up by the Salt Springs National Bank in the case of *Rosenback*. It is true, the judgment of the special term in the case of *Rosenback* was put solely upon the ground that the debt of Barnes grew out of paper discounted by the bank, on which he was indorser, and that the by-law relied upon as creating a lien upon his stock as security for such debt was within the prohibition of the 35th section of the act of congress. (15 *U. S. Stat. at Large*, 110.) I think the judgment of the special term might with propriety have been affirmed upon that ground; but the opinion of Mr. Justice MULLIN put the judgment of affirmance upon other grounds, decisive of the case at bar, in which I concurred. I am of the opinion that we ought to affirm this judgment upon the authority of that case.

BACON and MULLIN, JJ., were for affirmance.

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FOSTER, J., dissented, and stated that he concurred in the judgment in the case of *Rosenback v. The Salt Springs National Bank* solely upon the ground that the lien claimed in that case was within the prohibition of the act of congress. As the indebtedness of Chandler did not arise out of any loans or discounts within the prohibition of the 35th section, he was of opinion that the lien claimed by the bank should be adjudged valid.

Judgment affirmed.

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JAMES FISK JR. and others vs. THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILROAD COMPANY.

HATCH vs. THE SAME.

FANSHAW vs. THE SAME.

BELDEN vs. THE SAME.

The Supreme Court has jurisdiction, in actions brought by citizens of this state as holders of stock of a railroad corporation created by the states of Illinois and Iowa, for the purpose of restraining, by injunction, the use of the proceeds of an issue of stock alleged to be illegal and void, and appointing a receiver of such proceeds.

Neither a railroad corporation, nor its directors, have the right to make certificates purporting to represent capital stock, which has not in fact been subscribed and paid for, and to put them on the market and sell them below par. Every paper issued purporting to represent stock which has in fact no existence, is a false certificate; and the directors are not authorized to issue false certificates. Such issues are *ultra vires*.

The act of the directors in issuing such false certificates of stock, cannot be ratified by a subsequent statute, passed by one of the states from which the corporation derives its existence, alone; neither state having exclusive jurisdiction over the corporation.

An injunction should not be issued to restrain the corporation, except so far as the illegal certificates are concerned. The transfer of such certificates may be enjoined, and the proceeds held by the court to protect the company against claims for damages by the holders of false certificates, or to enable it to retire them.

THE plaintiffs in these several actions sued, as holders of original shares of the stock of the Chicago, Rock Island and Pacific Railroad Company, a corporation cre-

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ated by the states of Illinois and Iowa. The complaints alleged that the new issue of 49,000 shares of the stock was illegal and void, and demanded injunctions against the use of the proceeds of that issue, and the appointment of a receiver of such proceeds. Motions were made by the plaintiffs for the appointment of such receiver, and motions were made by the defendants to dissolve the pending injunctions against the use of the proceeds. All the motions came on and were heard together.

D. D. Field, J. E. Burrill and J. K. Porter, for the plaintiffs.

O. Tracy, W. M. Evarts, W. Fullerton, A. J. Vanderpoel and J. N. Whiting, for the defendants.

CARDOZO, J. I shall not follow the counsel over the extended field of discussion in which they indulged on the argument of the motions in these cases. The statement of a very few plain and well recognized propositions is all that is necessary to dispose of the question really involved. My views may be briefly expressed, as follows:

1. Even if my reflection and examination led me to a different opinion, which they do not, I should not feel at liberty to deny the existence of the jurisdiction which it is sought to have the court entertain, in these actions, since the point has been fully and distinctly decided by the general term of this court in *Griffiths v. Scott*, cited on the argument. My views accord with that decision, but in any event I should consider myself bound to follow it. In that case Judge INGRAHAM said: "I think there can be no doubt that a citizen of this state can maintain an action against a foreign corporation, for any cause connected with the recovery of, or protection to, his property or rights in said corporation." Judge LEONARD, in the same case, held that this court "has not the power to remove

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or appoint the trustees or directors of a foreign corporation, but it can enjoin their action, when illegal, or when acting fraudulently or unlawfully, if they are personally within our jurisdiction." These remarks are apposite to the present suits, and dispose of the point as to jurisdiction, raised by the defendants' counsel.

2. The issue of the 49,000 shares complained of, was *ultra vires*. Neither the corporation nor its directors had, in any view, the right to make certificates purporting to represent capital stock which had not in fact been subscribed and paid for, and to put them on the market as stock and sell them below par. If they might do so, and sell them at a discount of one or two per cent, they might sell them at fifty per cent, or any greater discount. It is not a question of good faith, or of honest intention, or of wise policy, or skillful or discreet management on the part of the directors; it is a question of power. Every paper issued, purporting to represent stock which had in fact no existence, was a false certificate; and the directors were not authorized to make false certificates. No such power attaches to their office, and the stockholders have the right to complain that they have assumed a power which was not conferred upon them. These views, controlling the case, are so familiar that they do not require the citation of authorities to support them.

3. The statute passed by the legislature of Iowa (*Laws of Iowa*, 1868, *ch.* 13) cannot alone ratify the act of the directors. The state of Iowa has not exclusive jurisdiction over this corporation. The certificates do not purport to represent stock in the original corporation created by the state of Iowa, but assume to represent stock of the consolidated company, consisting of that corporation and the one formed under the laws of Illinois. The latter state, therefore, has quite as much control of the present matter as the state of Iowa. Certainly the act of either, alone, will not aid the defendants.

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4. I see no reason why any injunction should have issued to restrain the defendants, except so far as the 49,000 illegal certificates are concerned. The transfer of the illegal issue was properly enjoined, and the proceeds should be held by the court to protect the company against damages in favor of the holders of the false certificates, or to enable it to retire them; but nothing is disclosed in the papers which satisfies me that it is either proper or necessary to prevent dealings in the genuine stock, or to interfere with the business of the corporation, except to the extent I have mentioned.

5. Respecting the motions to attach the defendants, I have only to remark that I do not think that any breach of the injunction has been established by the affidavits submitted to me, calling for any present action.

6. I shall appoint Hugh Smith, Esq., (the deputy city chamberlain,) receiver of the proceeds of the 49,000 illegal shares, requiring from him a bond with surety, to be approved, in \$500,000, and directing that each half million of dollars which shall come to his hands as such receiver shall be deposited alternately in the United States Trust Company and in the Union Trust Company.

7. The costs of these motions will be costs in the actions, and abide the event of the same.

8. An order in accordance with these views, and containing such provisions as may be deemed necessary to carry them into effect, will be prepared by the plaintiffs' attorneys and presented to me for settlement.

Ordered accordingly.

[NEW YORK SPECIAL TERM, at Chambers, April 6, 1868. *Cardozo*, Justice.]

WAFFLE *vs.* GOBLE.

The statute (*Code*, § 135) provides what kind of proof shall be made to the satisfaction of the court or officer granting an order for publication, that a party cannot, after due diligence, be found within the state. That fact must appear by affidavit. The return of a shereff will not answer; that not being the kind of evidence which the statute requires.

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Nor can the essential fact be made to appear partly by affidavit and partly by a return. It must be made to appear by affidavit only.

The affidavit may be made by a plaintiff in the action.

The statute does not prescribe who shall make the affidavit, but it must show to the satisfaction of the court or judge that due diligence has been used, and that the person to be served cannot be found within the state.

The filing of the complaint is not necessary, where the summons and complaint are served personally upon the defendant, soon after the order for publication is granted, and where no publication is made.

When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post-office.

Where the plaintiff failed to comply with the statutory conditions on which the action was deemed to be commenced, by the issuing of the summons; *Held* that it must be deemed not to have been commenced until the service of the summons and complaint, under the judge's order; that up to that time no action had been commenced, and none was depending; and that an attachment previously issued and levied upon the defendant's property had nothing to support it, but was wholly void, and should be set aside.

The order for publication, in such a case, however, if regularly granted, may be allowed to stand, without any reference to the attachment.

APPEAL by the defendant from an order denying a motion to set aside an attachment and order for publication.

The defendant was a non-resident of this state, and a resident of Michigan. The summons, and a warrant of attachment against the property of the defendant, were placed in the hands of the sheriff of Monroe county, on the 8th of October, 1866, and on the same day the sheriff, by virtue of such warrant, seized the defendant's property. On the 2d of January, 1867, the sheriff indorsed upon the summons that after due and diligent inquiry by him made, he could not find the defendant within his bailiwick, to

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make service of process upon him. On the following day, the plaintiff presented his own affidavit to the county judge of Monroe county, in which he set forth, among other things, that the defendant was his son-in-law, having married his daughter, and that in the fall of the year 1864 he left his residence in this state, and removed to Van Buren county in the state of Michigan, where he has since resided, with his family; that the summons issued in the action could not be served by reason of the defendant's residence out of, and his absence from, this state; that the deponent had searched for the defendant and endeavored to find him within the state, at the time of commencing the action; and that by search and inquiry he had been unable to find him, and did not believe he had been within this state since the fall of 1864; and that he would be likely to know, from the fact of the defendant being his son-in-law, and he having seen letters from him, the defendant. Upon this affidavit being presented to the county judge, together with the sheriff's return upon the summons, that officer, on the day last mentioned, made an order for the service of the summons by publication, in which it is recited as follows: "It appearing to my satisfaction, by the affidavit of the plaintiff, that a cause of action exists," &c., and "that the defendant cannot after due diligence be found within this state," &c., "I do order," &c. After the granting of the order, and on the 8th of January, 1867, a copy of the summons and complaint were served personally on the defendant, at his residence in the state of Michigan. No complaint had been filed in the clerk's office.

The motion to set aside the attachment and order was made on three grounds: 1. That the affidavit on which such order was granted did not show that effort was made to serve the summons; nor that the defendant could not be found; nor that any search had been made for him; nor that he was not in the state when the summons was

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issued. 2. That no complaint had been filed, in the action.
3. That the order for publication of the summons was not obtained, and the publication thereof commenced, within the time prescribed by statute.

The motion was denied.

Geo. F. Danforth, for the appellant.

M. S. Newton, for the respondent.

By the Court, JOHNSON, J. It is claimed by the appellant's counsel, that the judge who granted the order of publication had no right to receive or take into consideration the sheriff's certificate that he could not find the defendant in his county, to make service of the summons upon him. It is also claimed that proof by affidavit, that the defendant to be served "cannot after due diligence be found within the state," must be made by the officer, or other person who has possession of the summons, for the purpose of making service. And that the affidavit of the plaintiff, who could not serve the summons, was not competent proof before the officer, to satisfy him that the defendant could not be found within the state. The statute provides what kind of proof shall be made to the satisfaction of the court or officer granting the order of publication, that a party cannot, after due diligence, be found within the state. That fact must appear by affidavit. (*Code*, § 135.)

The return of a sheriff will not answer; that not being the kind of evidence which the statute requires. Nor could the essential fact be made to appear partly by affidavit and partly by a return. It must be made to appear by affidavit only. But although the return appears to have been presented with the plaintiff's affidavit, there is nothing to show that the judge who granted the order received or acted upon the return as evidence. On the

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contrary, the order recites that the fact appeared to his, the judge's, satisfaction by the affidavit of the plaintiff.

If the affidavit was competent as evidence, the presence of the return at the same time did not destroy or weaken its force. As to the competency of an affidavit by a plaintiff in the action for such a purpose, it was held to be competent and sufficient in *Van Wyck v. Hardy*, (20 How. Pr. 222.) That was a general term decision, which it is our practice generally to follow. The statute does not prescribe who shall make the affidavit, but it must show that due diligence has been used, and that the person to be served cannot be found within the state, to the satisfaction of the court or judge. In the present case it will be seen from the facts stated in the affidavit, in respect to the inquiries made, and the grounds of belief and knowledge, that it furnishes far more satisfactory evidence of the defendant's continual absence from the state, than any proof of search by a sheriff or other officer, who was a stranger to him, could furnish.

As to filing the complaint in a case like this, I am of the opinion it is not necessary. Here the summons and complaint were served personally upon the defendant, within a short time after the order of publication was granted. The Code (§ 135) provides that when publication is ordered, personal service of a copy of the summons and complaint out of the state, is equivalent to publication and deposit in the post-office. The complaint, by the same section, is to be "first filed," "in all cases where publication is made." And in that case "the summons, as published, must state the time and place of such filing." Here no publication was made, but the summons and complaint were served personally. The defendant having a copy of the complaint, there was no necessity of having it filed, where he could obtain a copy, or of a notice of the time and place of such filing, and the statute does not require it in such a case.

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But the third ground of the defendant's motion presents a question of more difficulty. The summons, as has been seen, was issued and the attachment levied on the 8th of October, 1866. The service of the summons and complaint upon the defendant in the state of Michigan, which is made the equivalent for publication, after the order for a service of the summons in that manner had been obtained, was not made until the 8th of January, 1867, more than ninety days after the summons was issued. The order for the service by publication was not obtained until the 3d of January, 1867, nearly ninety days after the issuing of the summons, and publication was never commenced. At the session of the legislature in 1866, section 227 of the Code, which gives the provisional remedy of attachment, was amended by adding to it as follows: "And for the purposes of this section, an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced, within thirty days." Previous to this amendment, it had been held by the Court of Appeals, in *Kerr v. Mount*, (28 N. Y. Rep. 659,) that an attachment could only be issued where an action was depending; and that an attachment issued where a summons had been issued, merely, and not served, was void, the issuing of a summons not being the commencement of an action for general purposes. By referring to the section, it will be seen that this provisional remedy is given only "*in an action arising on contract,*" &c. It must have the foundation of an existing depending action to stand upon, or it is a nullity. Of course, there is no action in existence until one has been commenced according to law. This amendment to section 227 was doubtless made to remedy a defect disclosed by the decision above referred to, and to render the provisional remedy, by attachment, more efficacious than it would be if the party were compelled to wait until the action was com-

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menced by the actual service of a summons, before he could have his warrant of attachment. Hence it was provided by the amendment, that for the purposes of that section, (§ 227,) in order to uphold and give effect to the warrant of attachment, the action should be deemed to be commenced when the summons was issued, on certain conditions. Since the amendment, therefore, a warrant of attachment properly granted and served immediately after summons issued, and before service thereof, is "*in an action*," and is valid and effectual, provided always, that the conditions on which the issuing of the summons is deemed the commencement of the action are subsequently complied with. In the present case the condition was not complied with, by personal service of the summons or the commencement of the publication thereof in thirty days. The question then arises, whether, after the expiration of the thirty days, and between that time and the service of the summons and complaint under the order, this action was legally depending, so as to afford a support to the warrant of attachment.

This depends upon the effect of the proviso in the amendment. A proviso in a statute always implies a condition, unless modified by subsequent words. The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enactment, whereas the latter only defeats the operation of the enactment conditionally. (*Bouv. Law Dict. tit. "Proviso," and cases there cited.*) A proviso is something engrafted on a preceding enactment, by way of limitation or otherwise, and is held to operate as a repeal of the purview of the act where it is inconsistent with it, as expressing the last intention of the lawgiver. (*Smith's Commentaries on Statute and Constitutional Law*, 712.) The effect of the amendment most clearly is, that in the particular case in which a warrant of attachment is properly issued, at the time of issuing the summons, or at any time

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afterwards, within thirty days, the action is deemed to be commenced and depending provisionally or conditionally only. If within the thirty days, however, the proviso or condition is not complied with, the action is no longer deemed to be commenced by the issuing of the summons, and the action is no longer depending. The warrant of attachment, consequently, being no longer "in an action" depending, has nothing to stand upon, and must necessarily fall. The subsequent steps within the thirty days are clearly jurisdictional matters, and must be taken in order to continue the pendency of the action, which is before then provisional only. This proviso is, in its character, quite like that attached to section 99. By that section, it is provided that the attempt to commence an action by the delivery of a summons to the sheriff or other officer of the county, with the intent that it shall be actually served, shall be deemed equivalent to the commencement thereof. But it also provides that such attempt must be followed by the first publication of the summons, or the service thereof, within sixty days. This has been uniformly held not to apply to the commencement of actions generally, but to actions in particular cases only. Supposing, in an action under that section, to save the statute of limitations, no subsequent steps should be taken after the issuing of the summons, would any one pretend that an action had been commenced for any purpose? I think not. By the proviso in the amendment in question, the legislature doubtless intended that a plaintiff should lose all benefit and advantage which might accrue from such a provisional remedy, unless he continued diligently and perfected the commencement of the action by the service of the summons in one of the ways provided for. It was not designed to give a plaintiff the privilege of seizing the defendant's property in advance, and holding it till it should suit his pleasure or convenience to proceed in his action. If the plaintiff, under this section, could hold the property ninety

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days before taking the subsequent steps, I do not see why he might not continue to hold it in the same way for years.

The plaintiff's counsel refers to section 139 of the Code, which provides that, from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. I do not see that this section has any particular bearing upon the real question involved in this case. The court undoubtedly acquired jurisdiction in the case by the allowance of the provisional order or warrant, after the suit was provisionally commenced by the issuing of the summons. But whether it retained such jurisdiction after the lapse of thirty days, when the action could no longer be deemed to have been commenced, is quite another question. It is obvious that in such a case the jurisdiction of the court must be provisional or conditional, as was the commencement of the action, and ceases the moment the law ceases to regard the action as having been commenced and to be depending. My conclusion, therefore, is, that the plaintiff having failed to comply with the statutory conditions on which the action was deemed to be commenced by the issuing of the summons, it must be deemed not to have been commenced until the service of the summons and complaint, under the judge's order, on the 8th of January, 1867. Up to that time no action had been commenced and none was depending, and the warrant of attachment had nothing to support it, but was wholly void, and should have been set aside.

The defendant asked also, by his motion, to have the order of publication set aside; but I do not see why that was not regularly granted, under the general provision for the service of a summons upon a non-resident defendant, without any reference to the attachment. So far as that is concerned, the order appealed from is correct.

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The order, therefore, so far as it refuses to set aside the warrant of attachment, should be reversed, and an order setting aside the attachment granted, and in other respects affirmed. No costs of the appeal allowed to either party.

[MONROE GENERAL TERM, June 1, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

HALSTEAD FORD and others vs. CHILLION FORD and others.

Independent of the Code, this court has the power on motion at special term, at any time before verdict, to allow amendments to pleadings, by permitting the insertion of a new cause of action or a new defense.

But the power of the court to allow such an amendment *during the trial of a cause* is quite a different thing. Such a power did not exist before the Code, nor has it been conferred by that statute, *it seems*.

The court has no power, *on the trial* of a cause, to allow the amendment of a pleading by inserting a new cause of action, or a new defense. And if such power is not possessed by the court, on the trial, it is not possessed by a referee. If, on the trial before a referee, such an amendment is desired, it can only be obtained by suspending the trial, or hearing, and applying, on notice, to the special term.

The opinions advanced in *Woodruff v. Dickie*, (18 How. Pr. 164,) that "a referee is no longer an officer of the court;" that "the court at special term has no more power to grant amendments than the court has on the trial;" and that "a referee has all the powers of a court at special term, to allow amendments," disapproved.

A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure.

A referee has no authority, on the trial of an action before him, to make an order allowing an answer to be amended by inserting therein the defense of the statute of limitations.

Although an order thus made is the subject of exception, and may be reviewed on appeal from the judgment entered on the referee's report, the plaintiff is not restricted to that mode of redress. He has the right to seek a more expeditious and less expensive mode.

The special term possesses the power to set aside any order made by a referee, in the progress of a cause, which he had *not authority to make*, and also the power to compel him to proceed to the trial of the issues referred to him for determination.

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ACTION brought by *cestuis que trust*, against their trustee and others. The complaint was personally served, and an answer having been put in, the plaintiffs demurred thereto; whereupon the defendants served an amended answer. Upon the issue thus joined, the cause was, by stipulation, referred to a referee to hear and determine. On the trial before the referee, the defendants moved for leave to amend their answer by adding a count setting up the statute of limitations. The plaintiffs objected to the amendment. The referee granted the motion, and made an order allowing the amendment, which was made accordingly. Previous to the final hearing of the cause, the plaintiffs, on notice, applied to this court, by motion, to set aside the order of the referee, and for a direction that he proceed to hear and determine the cause upon the issues referred to him for trial.

E. C. James, for the plaintiffs.

Geo. Morris, for the defendants.

JAMES, J. There seems to be some conflict in the decisions as to the power of the court to allow amendments to pleadings after issue joined. Leave to amend is asked for at different stages of the action; sometimes before trial, sometimes on the trial, and sometimes after trial; and the difference in the powers of the court at these different stages seems to have been lost sight of in some of the reported cases. So also of the powers of the court at circuit, on the trial, and the special term, on motion.

Before the Code this court possessed and exercised the power of allowing amendments to pleadings upon the application of either party; a new cause of action, or a new defense, was often allowed by amendment. It was a power necessary to the administration of justice; and the permis-

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sion for its exercise was obtained by application to the special term, upon notice.

The power of the court to allow such amendments being conceded, its permission or refusal, or the terms and conditions, were always in the discretion of the court, each case depending upon its own peculiar features, facts and circumstances.

That portion of the opinion in *Woodruff v. Dickie*, (31 *How. Pr. Rep.* 164,) which asserts "that the courts never claimed the power, either at common law or under any previous statutes, to allow an amendment to an existing pleading by the insertion of a new and different cause of action or defense," is unsound. It is true, courts never claimed the power of substituting one kind of action for another by amendment, as tort for assumpsit, or *vice versa*; but the power to add another cause of action of the same nature, or another defense that went to defeat the action, was always claimed, although permission was not always granted. Even the authorities cited by the learned judge in *Woodruff v. Dickie*, (*supra*,) do not deny the power above claimed, but negatively concede it. *Sackett v. Thompson*, (2 *John.* 206,) was for leave to strike out a single count and add a new count, or for leave to add two new counts. It appeared that a former action for the same cause had been once tried and the plaintiff nonsuited; that the present suit had been four several times noticed for trial by the plaintiff; and on these grounds the motion was denied; not because of the want of power; and not one of the authorities there cited put the denial on the want of power; while in two cases, *Bearcroft v. Hundreds of Burnham and Stone*, (*Levins*, 347,) and *Duchess of Marlborough v. Wigman*, (*Fitz.* 193,) the amendments were allowed under the peculiar circumstances of each case; thus asserting the power. *Trinder v. Durant*, (5 *Wend.* 72,) related to a plea in abatement, and hence had no application. *Williams v. Cooper*, (1 *Hill*, 637,) was an action of slander,

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and the declaration counted upon words charging the stealing of apples, and the plaintiff asked leave to amend by adding a count for stealing boards; the motion was not denied for the want of power in the court to allow it, but because the statute of limitations had run against the cause of action sought to be inserted, and the court said "a new cause of action would be allowed by way of amendment, provided the suit intended to embrace it and it was omitted through mistake;" here again asserting the power of the court to grant amendments by inserting new causes of action.

Numerous cases might be cited showing the exercise of such power by the courts; but it is unnecessary. Experience has taught the necessity of such a power. As was said by Justice Smith, in *Union Bank v. Mott*, (19 How. Pr. 267,) "the exercise of discretion (which such power confers) is among the most embarrassing duties cast upon the courts, and yet its existence and exercise is indispensable to the proper administration of public justice." I therefore repeat that, independent of the Code, this court at special term on motion, at any time before verdict, has the power to allow amendments to pleadings, by permitting the insertion of a new cause of action or new defense. (*Beardsley v. Stover*, 7 How. 294. *Harrington v. Slade*, 22 Barb. 161.)

But the power of the court to allow such an amendment *during the trial of a cause*, is another and quite a different thing. Such a power did not exist before the Code, and I cannot discover that it has been conferred by that statute.

In this case the application for leave to amend was during the trial, and was made to the referee. Before the Code, a referee had no power to grant any amendments to the pleadings, in an action pending before him. By section 272 of that statute, referees are given the same power of amendment as the court, *on the trial of a cause*,

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so that now each tribunal has equal powers of amendment *on the trial*. To determine this motion, it is only necessary to ascertain the powers of the court to allow amendments of pleadings on the trial. Whatever that power is must be deduced from chapter 6, title 2, part 2 of the Code. Sections 169 and 170 treat of material and immaterial variances; section 171, of a failure of proof; section 174, of mistakes, and how they may be relieved against; section 175, of fictitious names; section 176, of the errors and defects that may be disregarded; section 177, of supplemental pleading; section 172, of amendments, as of course; and section 173, of amendments *by order of the court*. The power to allow the amendments asked for in this case is claimed in virtue of section 173; and it is therefore important that it have a careful analysis, to determine if any such power is given.

It is by said section enacted that "the court may, before or after judgment, and on such terms as may be proper, amend any pleading, process or proceeding: 1st. By adding or striking out the name of any party. 2d. By correcting a mistake in the name of any party. 3d. Or a mistake in any other respect. 4th. Or by inserting other allegations material to the case. 5th. Or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The amendment allowed by the referee did not come within the first, second, third or fifth subdivisions. It was only claimed as authorized by the fourth subdivision, and that it came within the letter and spirit of the clause which authorized the court at any time to amend a pleading "by inserting other allegations material to the case." But an amendment setting up a new cause of action or defense is not within the phrase, "other allegations material to the case." The fair construction and meaning of that phrase is, that where a cause of action is improper

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erly set forth in the complaint, or defense in the answer, or a pleading is defective for any reason, the court may, in its discretion, at any stage of the case, authorize such imperfection or defect to be remedied by amendment, by inserting allegations necessary to make the case as intended by the original pleadings; but not to insert a new and distinct cause of action or defense. In fact, the fifth subdivision of section 731 negatives the idea that the law-makers by said section intended to vest in the court the power to change, upon the trial, the substance and nature of the issues presented by the original pleadings. Why would the legislature restrict the power of conforming the pleadings to the facts proved to cases where it did not change substantially the claim or defense, if by the preceding subdivision it had empowered the court to allow by amendment the insertion of a new cause of action, or new defense? Besides, the power given by the fourth subdivision may be exercised at any time before or after judgment; and if it empowered the court to allow by amendment the insertion of a new cause of action or defense, its exercise after judgment would be disastrous to the party against whom the amendment was allowed. The bare fact that the power given by the whole 173d section may be exercised after judgment, is conclusive that it did not contemplate the power of setting up a new cause of action or new defense.

I am aware that the general term in this district, in *Van Ness v. Bush*, (22 How. 481,) held that a referee, on trial, has the power to allow an amendment setting up a new defense. The members of the court were not united in that decision, and the case was published without assent. The cases cited in the opinion published do not sustain the decision. *Beardsley v. Stover*, (7 How. Pr. 294,) was not an amendment allowed on the trial, but was an application at special term, on notice, heard before trial; and the power of the court at such time, and on such motion,

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to allow an amendment of the pleadings, by inserting a new cause of action or setting up a new defense, is precisely what I assert; but the right to allow such an amendment *on the trial* does not follow. So, in *Harrington v. Slade*, (22 Barb. 164,) the motion was at special term, before trial, for leave to file a supplemental answer, and had no bearing upon the question of power in the court to allow a new cause of action or defense to be inserted in a pleading by amendment.

In view of the cases of *Catlin v. Hansen*, (1 Duer, 309,) and *Fagan v. Davison*, (2 id. 153,) in the former of which it was held "that evidence could not be given to support a defense different in its entire scope and meaning from that set up in the answer, and that the answer could not be amended so as to let it in;" and in the latter, "that a judge, on the trial of a cause, has no power to strike out the only defense made by the answer, and substitute another, different and inconsistent;" of the more recent decisions of this court, in *Union Bank v. Mott*, (18 How. 506; 19 id. 114 and 267;) *Woodruff v. Hurson*, (32 Barb. 557;) *Dunnigan v. Crummev*, (44 id. 528,) and the higher authority of *Everett v. Vendryes*, (19 N. Y. Rep. 436,) I think I may disregard the case of *Van Ness v. Bush*, (*supra*,) and follow these other decisions.

It is quite certain that, on the trial of a cause, the court has no power to allow the amendment of a pleading by inserting a new cause of action or a new defense. It is also clear that if such a power is not possessed by the court on trial, it is not possessed by the referee. If, on the trial, such an amendment is desired, it can only be obtained by suspending the trial or hearing, and applying, on notice, to the special term.

I cannot subscribe to the opinions advanced in *Woodruff v. Dickie*, (*supra*,) "that a referee is no longer an officer of the court," or "that the court at special term has no more power to grant amendments than the court has

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on the trial," or "that a referee has all the powers of a court at special term to allow amendments." A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure; and the difference between the powers of the special term and the court at circuit, on the trial, or the reference, I have endeavored to demonstrate.

It is perfectly clear that the referee had not authority to make the order sought to be set aside. But it is insisted that the plaintiffs have mistaken their remedy; that they cannot have relief by motion before verdict, but must except to the referee's ruling and appeal to the general term, after judgment. It is no doubt true that the order of the referee was the subject of exception, and might doubtless be reviewed on appeal from any judgment that might be entered on his report. But the plaintiffs were not restricted to that course for redress; they had the right to seek a more expeditious and less expensive mode. The special term, in my judgment, possesses the power to set aside any order made by a referee, in the progress of a cause, which he had *not authority to make*, and also the power to compel him to proceed to the trial of the issues referred to him for determination. Such was, in substance, the decision of the court in *Union Bank v. Mott*, (18 How. Pr. 506,) and in my judgment that ruling should be followed.

In that view the plaintiffs were right in their course of proceeding; and the order of the referee being beyond his power to grant, it must be set aside, with \$10 costs.

[ST. LAWRENCE SPECIAL TERM, June 2, 1868. James, Justice.]

SCOTT vs. FRINK.

An agreement by a creditor to accept a larger sum than that secured by his mortgage, and discharge the lien *before the debt is due by the terms of the mortgage*, is founded upon a valid consideration.

The debtor having paid a part of the sum thus agreed upon, which was accepted by the creditor, under the new agreement, and having refused to pay the balance according to its terms; it was *held* that the creditor, upon tendering satisfaction of the mortgage, was entitled to maintain an action to recover such balance.

Although a subsequent valid executory agreement, while its stipulations remain unperformed, cannot be pleaded as an *accord and satisfaction*, in a legal action brought upon a sealed instrument, a *tender of performance*, by the defendant may now be interposed, as an *equitable defense*, under the provisions of the Code of Procedure; and the court having equitable jurisdiction in all cases, may decree a satisfaction of the sealed instrument. *Per MORGAN, J.*

The authorities which deny the right of a defendant to set up a valid executory agreement, in avoidance of a suit brought upon a sealed obligation, are based upon technical rules of pleading in *legal actions*, and have no application to pleadings under the Code. *Per MORGAN, J.*

A PPEAL from a judgment of nonsuit. The case shows that on the eleventh day of October, 1852, one Luke Chapin executed his bond and mortgage to the plaintiff, to secure the payment of \$2450, in twenty equal annual installments, with annual interest, being the purchase price of certain lands that day sold by the plaintiff to said Chapin; that the defendant purchased the lands covered by the mortgage, of the said Chapin, in 1855, and assumed to pay the said bond and mortgage; that the defendant made several payments on the bond and mortgage up to the first day of January, 1865, and the balance had seven years to run; that on the first day of January, 1865, there then being no payment due, the defendant applied to the plaintiff, and asked him how much he would take and cancel the bond and mortgage, and offered him \$500 if he would cancel the mortgage and give him a satisfaction thereof; that the defendant at the time supposed there was over \$500 principal yet to become due on the bond and mortgage, but it did not appear that the plaintiff sup-

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posed there was that amount unpaid, although he did not know what the exact amount was; that the defendant said he would give the plaintiff \$500 for it, more or less, as he wanted to get it off his farm, and that the plaintiff accepted his offer; that the defendant thereupon paid the plaintiff \$250 in money and promised to pay the balance in two or three days, and then have the mortgage canceled; that he paid the plaintiff \$30 more in a day or two, and after that refused to pay the balance of the \$500. On the second day of December, 1865, the plaintiff tendered the defendant the bond and a satisfaction of the mortgage, and demanded the balance of the \$500; but the defendant refused to accept them, or to pay the balance. This suit is brought to recover such balance.

The case also shows that there was in fact but a little over \$400 to become due on the bond and mortgage. The defendant testified that when he agreed to pay the \$500 for the mortgage, he supposed there was \$900 due thereon, but did not know how much; that his boy had figured it up and made a mistake; that in fact he had forgotten a payment of several hundred dollars; that he should not have offered the plaintiff \$500 if he had known of the mistake, and that he refused to pay the plaintiff any more, after he found out the mistake.

John Beach testified that he heard the bargain, and understood them to say that the mortgage had ten years to run; that the plaintiff said he did not know the amount due on it, and the defendant said he did not; that the defendant asked the plaintiff how much he would take and cancel and discharge the bond and mortgage; the plaintiff said he would rather have the interest than the money; that the defendant offered him \$500 if he would cancel and discharge the mortgage, and said he wanted to get it off his farm; that the plaintiff told him he would accept his offer and take it; that the defendant then paid down \$250, and said he would pay the balance in a few days.

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At the close of the trial, the defendant moved for a nonsuit upon several grounds, which are noticed in the opinion of the court. The nonsuit was granted, and the plaintiff excepted.

Miner & Kern, for the appellant. It is a well settled principle of law, that the payment of a greater or less sum after a specified debt is due, in satisfaction of the debt, is not good, by way of accord and satisfaction; but that doctrine is not involved in this case. (1.) The agreement in this case was based on a good and sufficient consideration. The plaintiff was the owner of the bond and mortgage, which was not due, and could not be paid until ten years had elapsed, and was under no obligation to satisfy it, or to receive the money thereon from the defendant. (2.) It was a *chose* in action, like any other chattel, subject to any agreement the parties saw fit to make, upon a sufficient consideration, even if more was received than was due on the mortgage. (3.) It is like a government bond, a security, the owner of which has a right to sell for, and the purchaser the right to give, more than its face, or the premium thereon. (4.) It was a valuable consideration that passed to the defendant, in consideration for his promise to pay the defendant \$500. There were several hundred dollars due on the mortgage, drawing annual interest for ten years. The defendant had the money in his possession to pay it; he had obtained it for the purpose of clearing himself from debt. He neither wanted to hold it, and thus lose the interest, nor to invest it with the possibility of losing the principal. It was changing the time within which the mortgage was to be paid, and the amount due thereon. It was therefore a valuable and important consideration to the defendant. (5.) There is a clear distinction between this case and the class of cases holding similar contracts void for want of consideration.

One of the strongest cases is *Kellogg v. Olmsted*, (25 N. Y.

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Rep. 189,) which holds that "a promise not to pay a certain note, then due, until six months thereafter, and then pay the same with interest, was not a sufficient consideration to extend the time of payment." SUTHERLAND, J., in the prevailing opinion, assumes that "the benefit is all received by the person obtaining the extension," and holds that "after the extension is granted, such agreement or action on the part of the debtor naturally follows, and must necessarily be implied, and therefore holds the promise to extend void for want of consideration." Judge Davies, in a well considered opinion, which is concurred in by Chief Justice Denio, dissents, and holds that the promise not to pay until the expiration of six months was a valuable consideration for the extension. It can therefore be said of this case that it goes to the very extent that the court would go, in holding a contract void for want of consideration; and it falls very far short of settling the case at bar. (6.) In *Livingston v. Painter*, (43 *Barb.* 270,) Justice SUTHERLAND, the same justice who wrote the prevailing opinion in 25 *New York Reports*, 189, holds that "an agreement to waive the option to declare a mortgage due at a certain day, is a good consideration for a contract, which contract he is asked to enforce in equity;" and his opinion is concurred in by Justice INGRAHAM, and is established as law in the first district.

D. L. Atkins, for the respondent. This was a new and independent agreement, and there must have been some new and independent consideration to support it. I. It cannot be supported upon the ground of a sale, as a sale of an instrument cannot be predicated upon a debtor's simply paying a debt secured by it, and obtaining a discharge. (*Champney v. Coope*, 34 *Barb.* 539. *S. C.*, 32 *N. Y. Rep.* 543.) The evidence of both parties agrees that it was a payment and satisfaction, and not a sale, which was contemplated and agreed to.

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II. It cannot be supported as an agreement collateral to the bond and mortgage; as a *parol* agreement to pay a specialty cannot be enforced. (*Miller v. Watson*, 5 Cowen, 195. *Andrews v. Montgomery*, 19 John. 162.)

III. It cannot be supported upon the ground that an immediate payment of the debt, and a consequent stoppage of interest, was a good consideration. (*Kellogg v. Olmsted*, 25 N. Y. Rep. 189.) In the last cited case the creditor agreed to extend the time for the payment of a note a year, in consideration of the debtor's agreeing to keep the money and pay the interest upon it. This agreement was held to be without sufficient consideration. The court says, at page 192, "The rule of interest or value of the use of money being fixed by law, the law cannot hold the delay of payment to be either a disadvantage to the debtor, or an advantage to the creditor." There would be the same consideration in having one's money draw interest, as there would in avoiding payment of interest.

IV. It cannot be supported upon the ground that it was an advantage to the defendant to relieve his premises of the incumbrance. The law establishes the value of money and of its use, and the amount of money unpaid upon this mortgage, with the value of its use, would have satisfied the mortgage. *Kellogg v. Olmsted* (*supra*) establishes the principle, that delaying or anticipating the day of payment (the value of the use of money being established by law) cannot be held to be an advantage or disadvantage to either party.

V. It cannot be supported upon the ground that it was a compromise of a disputed, doubtful or unliquidated claim, as there was no dispute between the parties as to the amounts or times of the payments which had been made, and there was no doubt about its collection. Claims that are capable of being ascertained, by an arithmetical calculation, are not unliquidated. (*McDaniels v. Lapham*, 21 Verm. R. 222.) A contract under seal, before condition

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broken, cannot be discharged by an executory parol agreement. (*Allen v. Jaquish*, 21 *Wend.* 628. *Eddy v. Graves*, 23 *id.* 82. *Delacroix v. Bulkley*, 13 *id.* 71. *Dodge v. Crandall*, 30 *N. Y. Rep.* 307.) This unexecuted parol discharge could not have been pleaded in bar to an action upon the bond and mortgage. (*Day v. Roth*, 18 *N. Y. Rep.* 448. *Little v. Holland*, 3 *T. R.* 590. *Delacroix v. Bulkley*, 13 *Wend.* 71. *Lawrence v. Woods*, 4 *Bosw.* 362, 363. *Chitty on Cont.* 10th *Am. ed.* 116.) This contract cannot be supported upon the ground that it was an accord and satisfaction. The agreement had not been performed, and the defendant refused to perform before the plaintiff acted upon it. The plaintiff's subsequent tender of performance does not help him. (*Russell v. Lytle*, 6 *Wend.* 391. *Daniels v. Hallenbeck*, 19 *id.* 408. *Tilton v. Alcott*, 16 *Barb.* 598. *Day v. Roth*, 18 *N. Y. Rep.* 456. *Keeler v. Salisbury*, 33 *id.* 653.) An accord and satisfaction, before it can be pleaded in bar, must be full, perfect and complete. (*Mitchell v. Hawley*, 4 *Denio*, 414. *Frentress v. Markle*, 2 *Green, Iowa*, 553, and cases before cited.) The satisfaction was not complete in this case. Until full satisfaction was given and accepted, the plaintiff's right of action upon the bond and mortgage was not gone. (*Mitchell v. Hawley*, 4 *Denio*, 414. 2 *Parsons on Cont.* 6th *ed.* 688.) This executory agreement was not one that the defendant could have enforced. (*Day v. Roth*, 18 *N. Y. Rep.* 448. *Van Allen v. Jones*, 10 *Bosw.* 369, 374.) In the last cited case, brought upon a note payable *on demand*, the defendant pleaded that *at the time the note was made*, which was before due, (23 *N. Y. Rep.* 28; 42 *Barb.* 50.) it was agreed that he was to pay interest semi-annually, and the principal when he pleased. That subsequently it was agreed that he should pay \$500 principal and interest semi-annually until the note was paid, and that at the time of making the last agreement he paid \$500 upon it. This agreement was held to be wholly without consideration.

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The court also held that the payment of the \$500 did not make the agreement an executed one; that it could not be executed until the whole was paid. Half the amount agreed upon (the agreement being executory) turned out to have been less, instead of more, than the amount to have become due upon the bond and mortgage; a tender by the defendant of the amount would not have destroyed the lien of the mortgage. (*Keeler v. Salisbury*, 33 N. Y. Rep. 653. *Day v. Roth*, 18 id. 448.) The consideration is no better or stronger because the amount offered happened to be more, instead of less, than the amount to become due. The plaintiff brings this action upon the theory that this new executory agreement was substituted in the place of, and annulled, the bond and mortgage, upon the instant the new agreement was entered into. Unless this new executory agreement had the effect of releasing both parties from the bond and mortgage, and was an agreement that could be enforced by both parties, or pleaded in bar by the defendant in an action upon the bond and mortgage, this action cannot be maintained. (*Babcock v. Hawkins*, 23 Verm. R. 561. *Goodrich v. Stanley*, 24 Conn. R. 613, and cases before cited. 1 Wait's Pr. 903.) Accord and satisfaction of a covenant, before breach, is not a good defense to an action upon the covenant, unless the discharge is under seal. (*Mitchell v. Hawley*, 4 Denio, 414, 417. *Healey v. Spencer*, 20 Eng. Law and Eq. 476. S. C., 22 L. J. (N. S.) Exch. 249. *Berwick v. Oswald*, 1 Ellis & B., 72 Com. L. 294, 309. *Kay v. Waghorn*, 1 Taunt. 428.) This agreement was entered into by both parties upon a mere hazard, and was in effect a wager as to the amount to become due upon the bond and mortgage, and for this reason it cannot be supported.

MORGAN, J. The debt not being due at the time, the plaintiff was under no obligation to take payment in advance, and discharge the bond and mortgage, although

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he might oblige himself to do so by a valid agreement with the defendant.

It appears by the case, that the defendant did agree with the plaintiff that, if he would satisfy the bond and mortgage, he would pay him \$500 then, instead of paying the amount in yearly payments as the same should become due and payable by the condition of the bond and mortgage. It also appears that he was anxious to anticipate the payments and get the mortgage off from his farm. The plaintiff preferred to keep his money invested as it was, but on the defendant's offering to pay him \$500 to get rid of the mortgage, the latter concluded to accept it and satisfy the mortgage.

If the matter had rested here, perhaps neither party would have been bound by the agreement, for it would have been rather a proposition on one side not definitely acted upon by the other, so as to make it a binding contract. But the parties did not stop here. The proposition of the defendant was not only accepted by the plaintiff, but acted upon. The defendant in fact induced the plaintiff to accept a payment of \$250 at the time, and \$30 more in a day or two after. When these payments were made, they were made and accepted under the new agreement, and in part performance thereof. If the defendant had signified his intention of having them applied as payments upon the bond and mortgage, (where they must be applied if this judgment is sustained,) the plaintiff would doubtless have refused to accept them; and it is very clear that the plaintiff did not accept them, except as part performance of the new agreement.

In my opinion, this new agreement, after it had been thus far acted upon, became binding and obligatory upon both parties. There is no difficulty in finding a consideration to support it. The authorities are clear that a creditor may accept a less sum than what is stipulated for in the contract, and discharge it, when the debt is payable at

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a future day; and it seems to be equally clear that the debtor may oblige himself to pay more than is stipulated for in the contract, to induce his creditor to discharge an obligation not yet due. (1 *Smith, L. C.* 441, 444. *Chitty on Cont.* 640.)

The question here is not strictly one of accord and satisfaction. That question would perhaps come up if the defendant had tendered payment of the \$500 under the new agreement, and it had been declined by the plaintiff. When the plaintiff afterwards attempted to foreclose his mortgage, the new agreement and a tender of performance under it would have raised the question—a question, however, rather of form than of substance, as I shall presently show.

I think no good lawyer will question the proposition, that if the defendant had paid the \$500 under the new agreement, and the plaintiff had accepted it, the new agreement thus executed would be a good accord and satisfaction, and could be interposed as such to a suit afterwards brought by the plaintiff upon these sealed obligations.

Now when it is conceded that the new contract is founded upon a valid consideration, it must also be conceded that the parties may enforce performance of it; and although the authorities may doubt whether the new agreement can be pleaded as an accord and satisfaction, while its stipulations are unperformed, there is no difficulty in interposing such a defense, when it has been voluntarily performed by the parties, or when its performance has been enforced by the courts.

If the new agreement has been obtained by fraud, or is the result of a mutual mistake, the party injured may doubtless avoid it upon these grounds. But when it is otherwise valid, and none of these grounds are alleged or proved to avoid it, it may be enforced like any other contract. This action is brought to enforce such an agree-

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ment, and the only question before the court is, whether it is a valid agreement. That depends upon two questions: 1. Whether there is a valid consideration to sustain it. 2. If there is a valid consideration to sustain it, whether it can be avoided for fraud or mistake.

I have already said enough as to the consideration. Unless it can be avoided for fraud or mistake, it must be enforced; and after it is enforced, there will remain no more technical difficulties growing out of the numerous authorities cited upon the question of dissolving sealed instruments by contracts of an inferior nature.

It would doubtless be inequitable to require the plaintiff to apply the \$280 received by him under the new agreement, upon the bond and mortgage. If there was fraud or mistake which would authorize the defendant to avoid the agreement, he should have put the plaintiff in *statu quo*, by offering to rescind it. This he could not do without offering to cancel the agreement and take his money back. But, in fact, no fraud was pretended; and I am clearly of opinion that it is not a case where the court would afford relief on the ground of mutual mistake. Both parties had the means at hand to ascertain the amount unpaid upon the bond and mortgage. The defendant supposed he had got the advantage of the plaintiff. In this he was doubtless mistaken, but it was one of those mistakes for which the other party was in no way responsible, and which the commonest prudence on the part of the defendant would have corrected. To entitle a party to relief in such cases, the mistake must not only be material, but must be such that he could not with reasonable diligence have obtained knowledge of the fact. (*Willard's Eq.* 70.)

To my mind this is a very plain case. The agreement is not to be set aside because the consideration is inadequate. Suppose the defendant had given his note to pay the balance over the \$280, upon the payment of which

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the plaintiff had agreed, on his part, to satisfy the bond and mortgage. Until the note was paid, let it be conceded that there would be no accord, and no defense to an action on the bond; but when paid, the defense would be complete. Now the defendant, in order to succeed in this case, must maintain the proposition that he would not be bound to pay the note; or, if he desired to pay it, the plaintiff would not be bound to accept payment. It is said, in some of the cases, that the plaintiff might refuse to accept performance of the substituted agreement, and thus avoid a plea of *accord* and *satisfaction*. As a technical rule of pleading this may be so in a legal action, but under the Code of Procedure a *tender of performance* would entitle the defendant to be released from the obligations of the contract; and the court sitting as a court of equity as well as of law, would have no difficulty in decreeing a satisfaction of the mortgage. Thus the defendant would have a perfect defense to a suit upon the bond and mortgage; not, indeed, by way of *accord* and *satisfaction*, but by way of counter-claim. The authorities which deny the right of a defendant to set up a *valid executory agreement* to avoid a suit upon the original obligation, are based upon technical rules of pleadings in *legal actions*, and have no application to pleadings under the Code.

Assuming that the contract is valid, either party may enforce its performance, and when performed by the defendant, either voluntarily or after recovery against him in the action, he will be at liberty to enforce a satisfaction of the mortgage.

The judgment should be reversed, and a new trial granted, costs to abide the event.

FOSTER, J., concurred.

MULLIN, J. (dissenting.) No rule of law is better settled than that an instrument under seal cannot be discharged

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by a parol executory agreement. (*Delacroix v. Bulkley*, 13 *Wend.* 71. 2 *Coven & Hill's Notes*, 1477.)

Such an agreement may, however, be discharged by an executed parol agreement. (2 *C. & H. Notes*, 1477, *dec.*)

Such an agreement operates by way of accord and satisfaction.

These propositions may therefore be stated thus: a sealed instrument cannot be discharged by an accord, merely, but may by accord with satisfaction.

It is competent, however, for parties to a contract to discharge it by substituting in its place a new parol executory agreement, founded upon a new and sufficient consideration moving between the parties. (*Billings v. Vanderbeck*, 23 *Barb.* 546.)

In this case the plaintiff had purchased several articles of personal property, for which he had given his note, payable in November, 1852. Amongst the property thus purchased was a mare, which the defendant warranted sound. She proved to be unsound, and the plaintiff brought an action on the warranty, before a justice. Before the trial of that action the parties entered into a new agreement, whereby, in consideration that the plaintiff would discontinue said suit, and return to the defendant the property so purchased, the defendant promised and agreed to surrender to the plaintiff his note, and pay the costs of the action.

The plaintiff alleged that he offered to return the property at the time and place agreed upon, but the defendant did not attend to receive it; and the plaintiff sued on the new agreement. The referee found that the plaintiff was at the place agreed on for the return of the property, but the defendant was not present; that the plaintiff had voluntarily paid the note he gave for the property, and had sold the said property and kept the proceeds. There was judgment for the defendant, which the general term reversed, holding the old agreement was

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discharged by the new, and that the plaintiff was entitled to recover at least nominal damages.

In 2 *Pars. on Cont.* (5th ed. 681,) it is said the party holding the claim may agree to take a new promise of the other in satisfaction of it, or he may agree to receive a new undertaking when the same shall be executed as a satisfaction, * * * if the new promise be founded on a new consideration, and is clearly binding on the original promisor, this is a satisfaction of the former claim; otherwise it is no satisfaction. (*Babcock v. Hawkins*, 23 *Vt. Rep.* 561.)

In *Cortwright, adm'r of John Cook, v. George Cook*, (3 *Barn. & Ad.* 701,) the action was brought to recover for money paid by the plaintiff on an annuity bond to one Clay, signed by John Cook, as surety for the defendant. The plaintiff was compelled to pay the sum of £85, as such surety, and sued to recover it of the defendant, the principal debtor. The defendant gave in evidence an agreement entered into between the said John, George and one Sunderland Cook, whereby, in consideration of certain property transferred to the intestate, he assumed to pay the annuity in question. There was a verdict for the plaintiff, subject to the opinion of the court. The agreement was held to be a good accord, and bound the plaintiff.

In *Comyn's Dig. title "Accord," B 4*, it is said: "So an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance."

The agreement relied on by the defendant as the substitute for the bond and mortgage, was that the defendant would pay, and the plaintiff would receive, \$500 in satisfaction of the debt secured by the bond and mortgage, and that he would pay the money in two or three days. When this agreement was made, there was in fact \$389.55

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unpaid on the bond and mortgage, and it was payable in seven equal annual payments, from the time of making such agreement. Whatever was paid in satisfaction of the debt was paid before the defendant was obliged to pay it, and this payment was a sufficient consideration for the agreement of the plaintiff to accept the \$500 in full of the indebtedness. (*Newsam v. Finch*, 25 Barb. 175.)

We have, then, a new agreement to pay \$500 in two or three days, in lieu of the agreement evidenced by the bond and mortgage, and this agreement supported by a new and valid consideration.

Had the money been paid, it could not be doubted but that the transaction would have amounted to an accord and satisfaction, and an action to enforce either the bond or mortgage would have been barred.

Now if it be true that a new agreement, founded on a sufficient consideration, operated as an accord and satisfaction, then the plaintiff has the right to recover the amount unpaid upon the new agreement.

The question now is, did the plaintiff agree to accept the promise of the defendant to pay the \$500 in two or three days, in satisfaction of his bond and mortgage, or was it the money that he agreed to accept, should the same be paid within the time named by the parties?

If the former, then the new agreement was a satisfaction, within the cases cited. If the latter, then he was at liberty to recant at any time before actual payment.

I cannot believe that the plaintiff intended to relinquish his lien on the bond and trust to the defendant's promise to pay the \$500. (*Day v. Roth*, 18 N. Y. Rep. 456.)

If this is the correct view of the rights of the parties, then there was no satisfaction, and the bond and mortgage were left in full force.

It does not seem to be settled that a new agreement, founded on a new and sufficient consideration, will discharge an instrument under seal, if its effect is to dis-

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charge an instrument not under seal. (*Tilton v. Alcott*, 16 Barb. 598. *Bailey v. Howen*, 3 Bing. N. C. Rep. 915. 1 *Wait's L. & P.* 1039.)

The judgment should be affirmed.

New trial granted.

[ONONDAGA GENERAL TERM, June 30, 1868. *Foster, Mullin and Morgan*, Justices.]

THE PEOPLE, *ex rel.* William B. Stephens, supervisor of the town of Fremont, *vs.* PETER HALSEY, treasurer of the county of Steuben.

Where private interests only, or chiefly, are concerned, and the people are only the nominal party, the relator, who is the real party applying for a mandamus, must show that he, as an individual, is entitled to the relief sought. But on an application for a mandamus to compel a county treasurer to issue his warrant to enforce the collection of a tax assessed upon debts owing to non-residents, the relator demanding the relief, not for himself, but for the public, the supervisor of the town, being an inhabitant of the town, and a tax-payer therein, is a proper person to appear as relator.

Upon the return of a town collector showing that the taxes imposed upon debts owing to non-resident creditors remain unpaid, the statute makes it the duty of the county treasurer, after the expiration of twenty days from the return, to issue his warrant to the sheriff, commanding him to make of the goods and chattels and real estate of such non-residents, the amount of such tax, &c. (*Laws 1851, ch. 371, § 6.*) This is a mere ministerial duty which the statute imposes upon the treasurer, and peremptorily requires him to perform upon the making of the collector's return. He has no discretion to exercise, in the matter, and is invested with no judicial functions whatever, in regard to it.

He has no power or authority to sit in judgment upon the acts of the assessors of the town, or upon those of the board of supervisors of the county. Nor can he, in answer to an application for a writ of *mandamus*, against him, for refusing to perform his duty, bring their proceedings into review for the purpose of establishing errors or mistakes in such proceedings.

But want of jurisdiction may be alleged by way of answer to any and all judicial proceedings. Hence the county treasurer may challenge the jurisdiction of any and all of these officers and tribunals to make the assessment,

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or impose the tax thereon, and show, if he can, that the assessment and the tax are, both, or either, contrary to the statute, and void.

The assessors are not concluded by the verified statement of the agent of non-resident creditors, made in the prescribed form, of the amount of debts due such non-residents; but if they do not give full credit to such statement, they may go further, and make diligent inquiry for themselves, from the debtors and other sources, and thus ascertain the amount of such indebtedness from solvent debtors.

And having jurisdiction to make farther inquiries and investigations upon that point, their errors and mistakes, whatever they may have been, cannot be brought in question and reviewed on application for a mandamus.

Jurisdiction being established, a tax, founded upon the assessment, has all the force and vigor of a judicial sentence, importing absolute verity, notwithstanding such mistakes and errors.

APPEAL from an order made at a special term, directing a mandamus to issue to compel the treasurer of the county of Steuben to issue his warrant for the collection of a certain tax.

B. F. Young, agent in the county of Steuben for William, Earl of Craven, Alexander Oswald and Edmund B. Estcourt, non-residents of the state, made out and delivered to the defendant, as treasurer of the county of Steuben, a sworn statement of the debts due to them in twenty-five different towns in Steuben county, as required by section 2 of the Laws of 1851, page 722. This statement purported to be a true account of all debts owing to said Earl of Craven, Oswald and Estcourt, "which are liable to taxation under said act." This statement was delivered by the treasurer to the assessors of the town of Fremont. In it the amount of debts due to the individuals above named, from persons in said town, was alleged to be \$6505. The assessors, notwithstanding this statement, entered on the assessment roll the names of the above persons, as non-residents, and the sum of \$50,000 as being the aggregate amount due them in the town of Fremont, and a tax of \$2126.98 was charged upon that sum. That tax not having been paid, the county treasurer declined to issue his warrant for its collection, upon the

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ground as stated by him in his affidavit, that "it appeared that said tax was levied on an assessment of \$50,000, instead of upon \$6505, which was the amount returned" by the agent to the treasurer, and by him to the assessors. Application was thereupon made, at special term, by the plaintiff, as supervisor of the town of Fremont, for a mandamus directed to the defendant, Halsey, as treasurer of Steuben county, commanding him to issue his warrant to the sheriff for the collection of the tax. The motion being granted, Halsey, the treasurer, appealed to the general term.

Geo. S. Jones and D. Rumsey, for the appellant.

Hakes & Stevens, for the respondent.

By the Court, JOHNSON, J. The first objection made to this application on the part of the defendant is, that the relator is not the proper party to make it, he having no interest in the matter other than any other citizen of this state. But this is strictly a question of public concern, and not a mere matter of private interest. It relates to the collection of the state and county tax; to the money of the people, for the maintenance and support of their government, in which each citizen has an equal and common interest. In such a case any citizen may make the application. (*The People v. Collins*, 19 Wend. 56.) The people in such cases are the real party, and must necessarily act through individual information. Where private interests only or chiefly are concerned, and the people are only the nominal party, the relator, who is the real party, must show that he, as an individual, is entitled to the relief sought. The relator here demands the relief, not for himself, but for the public; and being an inhabitant of the town of Fremont, and a tax-payer, as well as the principal officer thereof, is manifestly a proper person to appear as relator.

The return of the collector of the town of Fremont,

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showing that the taxes imposed in that town upon the debts owing to these non-resident creditors remained unpaid, appears to have been made in due form. The statute in such cases makes it the duty of the county treasurer, after the expiration of twenty days from the return, to issue his warrant to the sheriff of the county, where the debtors reside, commanding him to make of the goods and chattels and real estate of such non-resident the amount of such tax, &c. (*Sess. Laws of 1851, ch. 371, § 6.*) This is a mere ministerial duty which the statute imposes upon the treasurer, and peremptorily requires him to perform upon the return of the collector being duly made, containing the necessary facts. He has no discretion to exercise in the matter, and is invested with no judicial functions whatever in regard to it. He has no power nor authority to sit in judgment upon the acts of the assessors of the town, or upon those of the board of supervisors of the county. The statute has not constituted that officer the tribunal for challenging their proceedings or for reviewing and correcting their mistakes or errors of judgment. Nor can he, in answer to an application for a writ of *mandamus* against him for refusing to perform his duty, bring their proceeding into review for the purpose of establishing mistakes or errors in such proceeding. He may, however, in such a case, I apprehend, challenge the jurisdiction of any or all of these officers and tribunals, to make the assessment, or impose the tax thereon, and show if he can that the assessment and the tax are both or either contrary to the statute, and void.

Want of jurisdiction may, I suppose, be alleged by way of answer to any and all judicial proceedings. That ground of defense is alleged and insisted upon in answer to this application, and presents the only question worthy of serious and careful consideration. The precise question is, whether the assessors are concluded by the verified statement of the agent of the non-resident creditor, made

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in the prescribed form, of the amount of debts due such creditor on the first of January preceding, as it appears from the abstract, a copy furnished and transmitted by the county treasurer, or whether they may go further and make diligent inquiry for themselves from the debtors, and other sources, and thus ascertain the amount of such indebtedness from solvent debtors, provided they do not give full credit to the statement furnished? The first section of the act before referred to makes all debts owing by inhabitants of this state, to persons not residing within the United States, for the purchase of real estate, personal property within the town or county where the debtor resides, and liable to taxation, "in the same manner and to the same extent as the personal estate of citizens of this state."

The second section provides that the agent of the non-resident creditor, if one resides in this state, shall furnish to the county treasurer of the county where the debtor resides, the true and accurate amounts of such debts, which were owing on the first day of January preceding, verified by his oath. By the fourth section, the county treasurer, on receiving such statement, is required to make out and transmit to the assessors of the several towns in his county in which any such debtors reside, an abstract or copy of so much as relates to the town of the assessor, with the name of the creditor.

The fifth section requires the assessors, on receiving such abstract or statement, and within the time required by law to complete their assessment roll, to "enter thereon the name of such non-resident creditor, and the aggregate amount due him in such town on the first of January preceding, in the same manner as other personal property is entered on said roll." It is claimed in behalf of the defendant, that the "amount due," which the assessors are required to enter upon their roll, must be taken from the statement furnished, and that the assessors are limited to

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that alone, and cannot go beyond it to any other source, to ascertain the amount due. There is no such restriction or limitation in terms, and I am clearly of the opinion there was no such in the intention of those who framed and enacted the statute. If such had been their intention, they would have been likely to have expressed it in some form, and not to have left it to uncertain inference or conjecture.

If they had designed to change the duties of the assessors in regard to this species of property, they would, as it seems to me, have expressed such design plainly and clearly. Instead of this, they have not subjected this species of property "to taxation in the same manner and to the same extent" as other personal estate, but have required the assessors to enter the "amount due" upon the assessment roll "in the same manner as other personal property is entered." Not the amount according to the statement, but the amount actually due, which is taxable, according to the general provisions of law, which is, "debts due from solvent debtors." (1 R. S. 388, § 3.)

The general duties of assessors in ascertaining the amount of real and personal property subject to taxation in the respective towns, is prescribed by statute. "They shall proceed to ascertain by diligent inquiry the names of all the taxable inhabitants in their respective towns, and also all the taxable property, real or personal, within the same." (1 R. S. 390, § 8.)

They are required to ascertain, by diligent inquiry, all the taxable property within the town, personal as well as real. No good reason can be shown why the assessors should be precluded from making inquiries in regard to foreign creditors any more than resident ones, and as no limitation is imposed in terms, it is impossible, I think, for the court to say judicially that one was intended. The obvious design in requiring the agent to make the statement provided for, as it seems to me, was to aid the

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assessor in the performance of his duty, and not to put the agent in his place, to assess his principal. The assessors may, doubtless, take the statement if they are satisfied with its correctness, as in most cases they will be quite likely to be; but if they are not satisfied with the statement, it is their plain and clear duty to go further and make "diligent inquiry," for the purpose of ascertaining the true state of the case. Their duties are to a certain extent judicial in their character, and these duties are not limited to domestic property holders.

The conclusion arrived at—that the assessors were not concluded by the statement of the agent, but had the right, in the exercise of their general duties and powers as assessors, to go beyond—is decisive of this motion. If they had jurisdiction to make further inquiries and investigations for the purpose of ascertaining and determining to their own satisfaction, the amount of debts due from solvent debtors to those foreign creditors, within their town, whatever may have been their mistakes and errors, they cannot be brought in question and reviewed here. Conceding that the assessors mistook mere equitable claims for "debts," and misjudged in regard to the solvency of those who were debtors, within the sense and meaning of the statute, it cannot affect the validity and conclusiveness of the tax. Jurisdiction being established, the tax, founded upon the assessment, has all the force and vigor of a judicial sentence importing absolute verity, notwithstanding such mistakes and errors. (*Kan Rensselaer v. Cottrell*, 7 Barb. 127. *Same v. Witbeck*, *Id.* 133. *Albany and West Stockbridge R. R. Co. v. Town of Canaan*, 16 Barb. 244.)

There is no ground for supposing that the assessors were guilty of fraud, or were actuated by any unlawful designs, in going beyond the statement to ascertain the amount of debts owing. As the tax in question cannot be questioned collaterally in the manner in which the defendant has

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sought to do it, the case should, perhaps, be rested here. But as this is an important question, and may operate as a precedent in other similar cases, some observations, *obiter*, of the meaning and force of the statute of 1851 may not be altogether inappropriate, though I do not intend to go beyond the points argued before me. The term "debts," in the statute, is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants of the state, to the non-residents mentioned, by certain and express agreements or judicial sentence, and for the purchase of real estate. Primarily, it looks to the relation of vendor and purchaser, by contract valid in law, and to no other relation. A mere assignee of a contract is in no legal sense the debtor to the vendor, unless he has expressly undertaken to pay the debt by some valid instrument or promise. In the latter case, he may, legally speaking, be regarded as the debtor of the vendor for the purchase of real estate. This, of course, must be understood to embrace cases only where the assignment is authorized and valid, of itself, or is rendered valid by some subsequent act or assent of the vendor, binding in law.

Debts barred by the statute of limitation would not fall within the statute, nor would mere equitable claims, where no legal relation of debtor and creditor exists. One person may hold a contract by assignment, without being the debtor to the vendor, in any such sense as the statute contemplates. If he is mere assignee, the original contractor is still the only debtor to the vendor, and unless he is a resident of the town, and solvent, the debt cannot be assessed in such town.

A "solvent debtor" is a person who has sufficient property to pay all his debts, and against whom collection of such debts may be enforced, out of his property, by due process of law.

The object of this statute, plainly, was not to discrim-

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inate against foreign creditors, but to subject their personal property within this state, justly and fairly, to taxation, in the same manner and to the same extent as the personal estate of citizens of the state. And in this spirit, and no other, should assessors act in the discharge of their duty in such cases. The writ must therefore be granted. And inasmuch as the assessment and tax were fair upon their face, and the defendant has no personal interest in the question, but has voluntarily undertaken, outside of his official duty, to defeat the tax, and prevent its collection, he must be charged personally with the costs of this proceeding.^(a)

[MONROE GENERAL TERM, March 4. 1867. *J. C. Smith, Welles and Johnson*, Justices.]

(a) The above decision was affirmed, unanimously, by the Court of Appeals, in September, 1867. But that court did not pass upon the question whether the statement furnished by the agent, to the assessors, was conclusive as to the amount to be taxed. (*See 37 N. Y. Rep. 344, 349.*)

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THE PEOPLE, *ex rel.* Inman S. Lowell, *vs.* THE BOARD OF
TOWN AUDITORS OF THE TOWN OF WESTFORD.

On the 15th day of March, 1864, fifteen proper persons signed a call for a special town meeting of the town of Westford, "for the purpose of paying bounties to volunteers in the military or naval service of the United States, during the existence of the war now carried on." The town clerk posted notices for one, following the language of the call. At the town meeting a resolution was offered that "there be paid \$300 to each man drafted, and not *exempted*." It was amended so as to include those who were drafted the year before and paid \$300, and, as amended, was passed. On the 8th of June, 1864, the relator was drafted as one of the quota of the town, under the call of December 17, 1864, and paid \$300, commutation. In April, 1865, the legislature passed an act legalizing the proceedings of town meetings in the county of Otsego, (the town of Westford being therein,) relating to the payment of *bounties* to volunteers, substitutes and *drafted men*.

Held: 1. That the relator was not *exempted*, within the meaning of the excep-

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- tion in the resolution, and that it should not be restricted so as to include only those who were drafted and actually entered the service.
2. That it applied to persons *thereafter* drafted under an impending call of the president.
 3. That the resolution was not void, as contrary to the policy of the general government, for the reason that it tended to keep *men* out of the service.
 4. That the repayment of the \$800 commutation was a "bounty," within the act of the legislature.
 5. That the defendants should not have been required *forthwith* to assemble and audit the relator's claim, but the mandamus should have ordered them to do so at their next annual meeting.

APPEAL from an order awarding a peremptory mandamus requiring the defendants forthwith to assemble and audit the relator's claim against their town.

On the 15th of March, fifteen persons, eligible to the office of supervisor of the town of Westford, signed a call for a special town meeting of said town "for the purpose of paying bounties to volunteers in the military or naval service of the United States during the existence of the war now carried on, and for the purpose of paying the incidental expenses of such volunteering, and of raising such money." This call was filed in the clerk's office March 16, 1864. On the 18th of March, 1864, the clerk posted four notices for a special town meeting, on the 26th, following the language of the call. On the 26th of March a special town meeting was held at the place designated, when a resolution, of which the following is a copy, was passed: "Resolved, that there be paid the sum of three hundred dollars to each man drafted and not exempted, and the same be raised by a tax upon the taxable property of the town." The resolution was amended so as to include those that were "drafted last year and paid \$300." The town clerk, on the day of its passage, put this resolution away in a pigeon hole in a desk of his office, without any indorsement. Two years after, on the 17th of March, 1866, a claim was presented, when Erasmus Snyder, the then town clerk, found it in the clerk's office, and indorsed

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on it, "Resolution passed March 15, 1864," (the date of the call, instead of the town meeting.) During 1864 the relator was a resident of the town of Westford. On the 8th of June, 1864, he was drafted for three years, as one of the quota of the town, under the call of the president of October 17, 1863. On the 23d of June, 1864, pursuant to notice, he appeared before the board of enrollment, was not exempted, and paid \$300 commutation. On the 14th of April, 1865, an act relating to the counties of Otsego and Herkimer was passed, as follows: "All acts and proceedings * * of legally convened town meetings * * relating to the payment of bounties to volunteers, substitutes and drafted men, * * are hereby legalized, confirmed and made valid." (*Laws of 1865, ch. 440, p. 800, § 1.*) At the annual meeting of the board of town auditors, (Nov. 7th, 1867,) the relator presented an account for \$300, with a copy of the papers, and requested them to audit and allow the claim, which they refused to do. He applied for a mandamus, which was granted at a special term, commanding them forthwith to assemble and audit the account.

J. E. Dewey, for the defendants, appellants.

N. C. Moak, for the relator, respondent.

By the Court, PARKER, J. This is an appeal from an order made at special term granting a peremptory *mandamus* requiring the defendants forthwith to assemble and allow the relator's claim of \$300 against the town.

This claim arose as follows: On the 24th of March, 1864, the town of Westford, at a special town meeting held on that day, passed the following resolution: "Resolved, that there be paid the sum of three hundred dollars to each man drafted, and not exempted, and the same be raised by a tax upon the taxable property of the town."

The People v. Auditors of Westford.

The resolution was amended so as to include those that were "drafted last year and paid three hundred dollars."

The relator, a resident of the town of Westford, on the 8th day of June, 1864, was duly drafted into the military service of the United States for three years, and on the 23d of June, 1864, paid to the proper officer \$300, and was discharged from further liability under that draft. On the 14th of April, 1865, a local act, relating only to the counties of Herkimer and Otsego, was passed, so much of which as applies to the question before us is as follows: "All acts and proceedings * * of legally convened town meetings * * relating to the payment of bounties to volunteers, substitutes and drafted men, * * are hereby legalized, confirmed and made valid." (*Laws of 1865, ch. 440, § 1.*) On the 7th of November, 1867, the relator presented to the board of town auditors of the town of Westford his claim for the amount so paid by him, accompanied by the requisite proofs. The board passed upon and rejected the claim, and refused to audit and allow the same.

The claim was then, and is now, resisted on the grounds that the resolution does not apply to the relator's case, inasmuch as he was drafted, and *exempted* from *military service*, whereas the resolution provides for the payment of \$300 to "each man drafted and *not* exempted;" and that the act of the legislature legalizes proceedings of town meetings relating to the payment of *bounties* to volunteers, substitutes and drafted men, and to no other payments. It is argued by the counsel for the appellants, that the resolution, and statute legalizing it, should be so construed as to harmonize with the then existing circumstances, and the wants and policy of the government—the call being for men and not money; and that in the light of those circumstances, the resolution should be deemed intended to induce drafted men to go into the service, instead of to furnish them means, raised from tax-payers,

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term, *not exempted*. The sum voted, they say, was to be paid "to each man drafted, and not exempted;" that is, as the words "*not exempted*" have a general signification, and are not at all restricted in the resolution—not exempted in any way or for any cause, whatever—and the relator, although drafted, yet upon paying his \$300, became thereby exempted from military service, the effect of the draft, and therefore is not, within either the terms or spirit of the resolution, entitled to the money from the town.

It is quite true, as the appellant's counsel insists, that in giving construction to the resolution, we should keep in mind the circumstances, wants and policy of the government, as they appear and are expressed in these acts of congress. And it is also true, that as the resolution was passed with special reference to the provisions of these acts, the language adopted in it should be construed in view of that fact. Thus we see that, under the acts, the payment of a sum to be fixed by the secretary, not exceeding \$300, by a drafted person, is not declared to *exempt* him from military service, but to entitle him to be "discharged from further liability under that draft;" while another provision of said acts prescribes that "persons physically or mentally unfit for the service," with others enumerated, (*not including drafted persons paying the \$300,*) and no others, *shall be exempt*. Where, therefore, the resolution says, "there shall be paid to each man drafted and *not exempted*," the same meaning should be given to the term *exempted* as is given to it in the acts of congress, and it should be understood to mean, not *exempted*, as being persons specified in the 10th section of the act of February 24, 1864, who are the only exempts allowed by the law.

Against this construction I do not see any thing in the needs of the service or the policy of the government. By these acts of congress it had been assumed that the pay-

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ment, by a drafted man, of \$300, was equivalent to the procurement of a substitute. The money was paid by the drafted man to the government for that purpose, and the government undertook, in his stead, to procure the substitute. Under this policy the drafted man who paid \$300 was treated by the law, and should, for the purposes of the question before us, be considered as having fulfilled his personal obligations in the premises, as fully and completely as if he had, himself, gone to the field and there performed the duties of a soldier. And the reason for refunding him the money he had so paid for a substitute, was the same as though he had himself procured the substitute. And as a question of governmental policy and of strict justice, there was equal reason for providing that the tax-payers of the town should pay him back what he had thus paid to the government, as for paying him the same sum for himself procuring a substitute, or becoming a soldier. In either case it is to be presumed he furnished a soldier for the government, and it was just and right that his fellow townsmen should share with him the loss thereby incurred.

The amendment to this resolution, which made it include those who were drafted the year before, and who paid \$300, tends strongly to show the intent to have been as we have above construed it.

The idea that the voters who passed the resolution intended to restrict the payment to such drafted men as should themselves enter the military service of the country, is contradicted by the fact that they put those of the previous year who did not go, but paid, in the same category with those for whom they now provide the \$300. The mind of the voters upon the point in question is indicated by the amendment. No reason appearing for the difference, it is not to be presumed that they intended, so far as the resolution might operate, to enforce the draft personally, against those to be drafted, while they allowed

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payment for a substitute to those drafted the year before. The intent as to those drafted last year being clear, beyond dispute, greatly strengthens the conclusion at which we have arrived, of a like intent as to those to be drafted the then present year, even if such intent is less clearly expressed in the resolution. I have no doubt that the relator's case is covered by the resolution.

I think, also, the act of the legislature includes the resolution in its legalizing effect. No question is made but that the town meeting which passed the resolution was legally convened. It is insisted, however, that the acts and proceedings of such town meetings relating to the payment of *bounties* to volunteers, substitutes and drafted men, alone are confirmed. And *bounties*, it is said, were given, in accordance with the meaning of the word, to induce men to enlist into, or to enter, the military service of the country. Hence it is argued that the confirmatory act does not apply to such a case as that of the relator.

I can see no reason, either from the signification of the word, or from any other cause, for construing the word *bounties*, in its application to drafted men, as meaning payments to those, and those only, who served personally in the army. Drafted men were, in no sense, *volunteers*, and whatever provision was made for them, either by towns or counties, was made, not to *induce* them to enter the service, but as a gift or bounty, to indemnify them for having been drawn into it, against their will. As already shown, the policy of the government did not require or prefer the personal service of the drafted man, but accepted as a full performance of his duty the procurement of a substitute, by himself, or through the agency of the government, upon payment by him of the price. It is a well known public fact, that it was not the custom in resolutions for payments to drafted men to make it a condition that they should do military service in their own proper persons. I do not think such a case can be found, or ever

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happened. When the act, then, speaks of *bounties* to volunteers, substitutes and *drafted men*, it means, as applied to drafted men, such gifts or bounties as are ordinarily voted to them, bounties in one sense, as being voluntary bestowments, and used in that sense, the other being manifestly inapplicable.

The relator being entitled to the amount claimed by him from the town, it was the duty of the board of auditors to audit and allow the claim; this being the mode prescribed by law for putting it in condition to be provided for by the board of supervisors of the county. A mandamus was the proper remedy for the relator, upon the refusal of the board of auditors to perform that duty. (*People v. Board of Supervisors of N. Y.*, 32 *N. Y. Rep.* 473. *People v. Taylor*, 30 *How.* 78, 86.)

The mandamus in this case required the defendants to assemble *forthwith* and audit and allow the relator's claim. There is no provision of law authorizing boards of town auditors to hold *special* meetings; the town officers composing the board are to meet annually on the last Thursday preceding the annual meeting of the board of supervisors of the county, at which meeting they are to audit and allow the accounts of all charges and claims payable by their respective towns. (3 *Gen. Stat.* 302, 303.) The statute having thus fixed the time when they shall meet and perform their duties as auditors, and not having authorized any other meeting, I am inclined to think it is not competent for them to meet and perform those duties at any other time. It is by virtue of special statutory authority that boards of supervisors hold special meetings. (*Laws of 1838, ch. 314, § 5.*)

The order appealed from should be so modified as to direct the writ therein allowed to require the defendants as the board of town auditors of the town of Westford, instead of assembling *forthwith*, and auditing and allowing the relator's account, &c., at their next annual meeting,

The People *v.* Supervisors of Otsego County.

to audit and allow the amount, charge and claim, &c., as in said order specified. And the writ issued upon said order should be amended accordingly. Neither party should be allowed costs of this appeal.

Decision accordingly.(a)

[BROOME GENERAL TERM, July 21, 1868. *Balcom, Boardman, Parker and Murray, Justices.*]

(a) Affirmed by the Court of Appeals, June, 1869.

THE PEOPLE, *ex rel.* The Central Bank of Cherry Valley, *vs.*
THE BOARD OF SUPERVISORS OF THE COUNTY OF OTSEGO.

THE PEOPLE, *ex rel.* The Bank of Cooperstown, *vs.* THE
SAME.

THE PEOPLE, *ex rel.* The Otsego County Bank, *vs.* THE
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THE PEOPLE, *ex rel.* The Worthington Bank, *vs.* THE SAME.

Whenever claims in respect to assessments for taxes upon United States bonds, stocks or securities exempt from taxation, are presented to the board of supervisors of either of the counties mentioned in the act of May 17, 1867, (*Laws of 1867, ch. 938.*) it is the duty of the board to hear and determine such claim, and to repay to the claimant the amount collected or paid upon such assessment, by levying the same by tax upon the taxable property of the county.

The act is mandatory and imperative upon the board of supervisors to determine the amount of taxes the claimants have paid by reason of assessments upon such exempt property, and to cause such amounts of taxes to be collected and repaid, in the manner prescribed in said act. It is not discretionary with them to cause such taxes to be repaid, or to refuse to do so.

The first duty imposed upon a board of supervisors, by the law of 1867, is to ascertain and determine whether the applicants were assessed, and whether they paid taxes as stated in their claims, and if they paid any such taxes, the amounts thereof.

The People *v.* Supervisors of Otsego County.

The legislature having "authorized and empowered" a board of supervisors to cause taxes illegally assessed and paid in their county to be repaid, it becomes their duty to do so, whenever truthful claims for such taxes are duly presented to them; and if they fail to perform that duty, but determine that the county and the towns against which the claims are made cannot in justice refund such taxes; that the claims are invalid; and that the same be not allowed, such board will be compelled by mandamus to proceed and perform such duty.

APPEALS by the several relators from orders made at a special term denying their respective applications for writs of peremptory mandamus.

The relators claimed that they were illegally assessed in the years 1861, 1862, 1863 and 1864, on their capital stocks, which were invested in bonds or stocks of the United States, and exempted from taxation for state and municipal purposes. They presented their claims, for taxes paid by virtue of such assessments, to the defendants, on the 13th day of November, 1867, and requested them to hear, determine, audit and allow the same, under and pursuant to chapter 938 of the laws of 1867. The total amount of the claims exceeded \$30,000.

The defendants were in session as a board of supervisors, when the claims were presented. They referred the claims to a committee of their number, who reported that they had examined the said claims, and that in their opinion the county and towns against which the claims were made could not in justice refund the said taxes. The defendants thereupon, on the said 19th day of November, 1867, as a board of supervisors, adopted a resolution, in each of the cases, to the effect that the defendants, as such board, had heard and examined the claim for refunding certain taxes, and determined the said claim to be invalid, and that the same be not allowed.

The applications for writs of mandamus were denied, on the sole ground that the defendants had heard and determined the matters of the claims adversely to the relators.

The People *v.* Supervisors of Otsego County.

J. E. Dewey and *H. Denio*, for the relators.

Sturges & Countryman, for the defendants.

Ry the Court, BALCOM, P. J. The duty of the defendants, under the law of 1867, (*Laws of 1867, vol. 2, p. 2323*.) was to hear the applications of the relators, and determine their claims of assessments for taxes made in the county of Otsego, upon United States bonds, stocks or securities, any or all of them, which by law were or had been exempt from taxation, and to repay to them the amounts collected or paid upon such assessments. It was not the duty of the defendants personally to repay such amounts; but it was their duty to levy the same by tax upon the taxable property of the county, and adjust and apportion the same upon the property of the different towns in the county as should be just, in the manner provided by section 3 of the law referred to. According to the well settled rules for the construction of statutes, the law of 1867 was mandatory and imperative upon the defendants, as a board of supervisors, to determine the amounts of taxes the relators paid by reason of assessments made in the years 1861, 1862, 1863 and 1864, upon United States bonds, stocks or securities exempted by law from taxation in those years; and to cause such amounts of taxes to be collected and repaid to the relators, in the manner prescribed by the law of 1867. (*Laws of 1867, vol. 2, p. 2323*.)

The rule above mentioned is so firmly established, it is unnecessary to refer to the authorities where it is laid down. The defendants have not determined that the relators did not pay any such taxes as they claimed they had paid, in the years 1861, 1862, 1863 and 1864, but that the county and the towns against which the claims were made could not in justice refund the taxes; and that having heard and examined the claims, they determined the same were invalid, and that they be not allowed. It is

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clear, if the relators paid the taxes they claimed they paid, their claims were not invalid, nor could the defendants legally disallow the same.

The first duty imposed upon the defendants, as a board of supervisors, by the law of 1867, they have refused to perform, which duty was to ascertain and determine whether the relators were assessed, and whether they paid taxes as stated in their claims, and, if they paid any such taxes, the amounts thereof.

The error committed by the defendants was the result of an erroneous construction of the law of 1867. They supposed it was discretionary with them to cause such taxes as the relators claimed they had paid, to be repaid, or to refuse so to do; but the law of 1867 did not vest any such discretion in the defendants.

When the legislature "authorized and empowered" the defendants to cause taxes illegally assessed and paid in their county to be repaid, it became their duty to do so, when truthful claims for such taxes should be duly presented to them. (*People v. The Supervisors of New York*, 11 Abb. 114. *People v. Common Council of Brooklyn*, 22 Barb. 404. *People v. Haws*, 34 *id.* 69. *Mayor v. Furze*, 3 Hill, 612. 4 *Wallace*, 435. 5 *id.* 705.)

If the defendants had determined that the relators had paid the taxes, as stated in their claims, the further duty would have remained to be performed by them, of allowing such claims, and levying the amounts thereof by tax upon the taxable property of Otsego county, and causing the same to be repaid to the relators, in the manner prescribed by the law of 1867.

If these views are correct, the judge at special term erred in refusing to grant orders for the writs of mandamus, for which the relators applied; and the orders of the special term should be reversed, and orders granted for peremptory writs of mandamus, requiring and commanding the defendants to hear the claims of the relators, and

O'Brien v. Chicago, Rock Island and Pacific R. R. Co.

determine whether they paid the taxes, as stated in their claims; and if they paid any such taxes, the amounts thereof; and further, if they paid any such taxes, to audit and allow the amounts thereof, and cause the same to be levied, collected and repaid to the relators, as prescribed by chapter 938 of the laws of 1867.

[BROOME GENERAL TERM, July 21, 1868. *Balcom, Boardman, Parker and Murray, Justices.*]

O'BRIEN vs. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and others.

MUSGRAVE vs. THE SAME.

GATES vs. THE SAME.

Where, in an action by holders of original stock in a corporation created under the laws of other states, to set aside an issue of new stock made by the directors, it appears that the legislature of one of such states has passed an act confirming such issue of stock, and the Supreme Court of the other state has decided that such issue was legal and valid, this court will not continue an injunction restraining the use of the proceeds of the sale, or appoint a receiver of such proceeds; especially where the action is approved by a large majority of all the stockholders.

THE plaintiffs in these actions sued as holders of the original stock of the Chicago, Rock Island and Pacific Railroad Company, a corporation formed and existing under the laws of Illinois and Iowa. The complaints were substantially like those in the cases of *Fisk and others v. The same defendants*, (*ante*, p. 472.) The plaintiffs now moved for the appointment of a receiver of the proceeds of the 42,000 new shares of stock issued and sold by the executive committee of the company. The defendants also moved to dissolve the preliminary injunctions restraining the use of such proceeds. It appeared, among other

O'Brien v. Chicago, Rock Island and Pacific R. R. Co.

things, that the former suits had been discontinued; that the legislature of Iowa had passed an act fully confirming the issue of the 49,000 shares of stock; and that the Supreme Court of Illinois, in an action brought by the attorney general of that state, against the company, had decreed that such issue was legal and valid; and also that while the former actions were sustained by the petition of a majority of stockholders, the present actions were opposed by a large majority—about three-fourths in amount—of all the stockholders. All the motions were heard together.

Mr. Wingate, E. W. Stoughton and L. B. Marsh for the plaintiffs.

C. Tracy and W. Fullerton, for the defendants.

CARDOZO, J. If these cases presented only similar circumstances to those which existed when the cases of Fisk, Fanshawe and others (which have since been discontinued) were decided, of course I should make the same disposition of them as I did of those cases; my confidence in the accuracy of the views I then expressed not only being undiminished, but being sustained by the unanimous judgment of the general term.

The corporation defendant here is subject to the jurisdiction of the states of Iowa and Illinois, and by the laws of those states its powers must be tested. The former state had ratified the action of the defendant when the other cases came before me; and now a decision of the courts of Illinois, which I feel bound to respect as an authoritative disposition of the law of that state, is cited, showing that the acts of this corporation, though they would not be within its power according to our law, are so according to the law of the state of Illinois. No decision of that state, bearing upon the point, existed when the

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other cases were argued. This puts the present applications in an entirely different position from that which the previous cases occupied, and necessitates that the injunctions should be dissolved and the motion for a receiver denied; a conclusion which I reach the more willingly from the circumstance that a large proportion of the stockholders, instead of, as on the argument of the previous cases, asking that the injunctions be continued and a receiver appointed, now elect to ratify the acts of the corporation, and ask that the injunctions be dissolved.

The motion for a receiver must be denied, and the injunctions vacated, without costs, and, under the circumstances, the plaintiffs must have leave to discontinue these suits, without costs, if they desire.

The vacating of the injunctions will render any action upon the petition in the cases of Fisk, &c. unnecessary.

[NEW YORK SPECIAL TERM, at Chambers, August 3, 1868. *Cardozo*, Justice.]

BIGELOW *vs.* DUNN.

After the trial of an action has been commenced, the power of courts over the amendment of the pleadings is of a very limited and restricted character.

But at any time before the trial has begun, the pleadings may, upon special motion, be changed and amended, in all respects.

This power is possessed by courts of justices of the peace, in common with courts of record. They may therefore allow a plaintiff, in that stage of the cause, to amend his complaint by changing it from one form of action to another; as from an action for fraudulent representations to an action for a breach of warranty

A PPEAL by the plaintiff from a judgment of the county court of Wyoming county, reversing a judgment recovered by the plaintiff before a justice of the peace.

Bigelow v. Dunn.

E. E. Harding, for the appellant.

R. Olney, for the respondent.

By the Court, DANIELS, J. Upon the return of the summons, when the parties appeared before the justice, the plaintiff complained of the defendant for inducing him to purchase an ox, by means of certain alleged false and fraudulent representations. When the parties again appeared before the justice, the plaintiff asked leave to amend his complaint by changing it from an action for fraudulent representations to an action for a breach of warranty. And that change the justice allowed to be made, notwithstanding the objection of the defendant. If the justice had no power to allow this change to be made, that, of itself, furnished a sufficient reason for the reversal of the judgment afterwards rendered by the justice.

The application for the amendment of the complaint was made upon the adjourned day, before the trial of the cause had been commenced. This circumstance is a very important one, because it distinguishes this case from those of *Ransom v. Wetmore*, (39 Barb. 104;) *Whitcomb v. Hungerford*, (42 id. 177;) and *Walter v. Bennett*, (16 N. Y. Rep. 250.) After the trial of a cause has been commenced, the power of courts over the amendment of the pleadings is of a very limited and restricted character. But, before the trial has begun, it is as complete and ample as the nature of the case, and the proper administration of justice, can well require it to be. Then, in courts of record, the pleadings, upon a special motion made for that purpose, may be changed and amended in all respects, as the nature of the action in which they are made may properly require them to be. And this power, under the former as well as the present system of practice, has been possessed, in common with those courts, by the courts of justices of the peace. (*Brace v. Benson*, 10 Wend. 214. *Mosher v. Law-*

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rence, 4 Denio, 419. *Colvin v. Corwin*, 15 Wend. 557. *Troy and Boston Railroad Co. v. Tibbits*, 11 How. 168. *Doughty v. Crozier*, 9 Abb. 411.)

Instead of being restricted, it has been enlarged, and rendered more comprehensive by the very general provision contained in the Code, upon this subject. By that provision it is declared, that pleadings may be amended at any time before the trial, where substantial justice will be promoted by the amendment. (§ 64, *subd.* 11.) So far as this subdivision relates to amendments before the trial it is unqualified and unrestricted, except that the power must be exercised for the promotion of substantial justice. In that stage of the case, it is broad enough to allow the complaint to be so amended as to change from one to a different form of action. There is greater need of such a power in justices' courts than there is in courts of record, for mistakes are more liable to be made in them, requiring the exercise of it, than they are where the pleadings are carefully prepared by those who are accustomed to draw them. Many cases must arise where the absence of such authority would be productive of very great inconvenience, as well as positive injustice. The power is essential to the complete administration of justice, and under the general language of the Code upon the subject, there is no good reason for supposing that justices' courts were not designed to possess and exercise it. The denial of it would be unjust to the plaintiff, without being productive of any benefit to the defendant. Many cases occur in these courts, where from ignorance or inadvertence a form of complaint is adopted that is entirely inappropriate to the merits of the plaintiff's right of action, in which, without such authority for the correction of the mistake, the party affected by it would be compelled to discontinue, and commence a new suit. In some cases of that kind, the cause of action itself may be, in the meantime, extinguished, by means of the statute of limitations; while

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in all it would be the occasion for unnecessary vexation, delay and expense. There is no good ground for supposing, after the very general provision made for amendments before the trial, that the legislature intended that parties should be exposed to losses and embarrassments of this nature on account of a mere mistake in pleading. No difficulty can be found in the way of the exercise of this authority. For the defendant can be fully protected by requiring the plaintiff to consent to an adjournment, as a condition of the amendment, and by the justice imposing such terms upon him, by way of costs, as will reimburse the expenditures made by the defendant in preparing for the trial of the action. In any view that can be taken of this subject, the justice was right in allowing the complaint to be amended.

The evidence was sufficient to justify the conclusion, as a matter of fact, that the defendant warranted the ox. The defendant represented him to be a good one, and that he would do the plaintiff a good summer's work. And it was for the justice to decide, under all the circumstances of the case, whether this was intended and accepted as a warranty. (1 *Wait's Law and Prac.* 518-521, and cases cited.) Upon this question the justice found for the plaintiff, and the court, upon appeal, could not properly reverse the judgment because it differed with him as to the mere force of the evidence.

The judgment of the justice was right, under his views of the evidence, and it should not have been reversed by the county court. The judgment of that court should, therefore, be reversed, and that of the justice affirmed.

[ERIE GENERAL TERM, September 7, 1868. *Daniels, Marvin, Davis and Barker*, Justices.]

JOHNSON *vs.* CROFOOT, Sheriff, &c.

A lease of a dairy farm, with cows and other property, for a term of years, at a specified rent payable yearly, contained this clause: "The party of the first part [the lessors] are to have full title, with the privilege of taking possession at any and all times, of any and all products of the farm, in payment of the balance due on the rent," &c. *Held* that this clause was a mere security for money, and was necessarily in the nature of a *chattel mortgage*; and that the only title the lessors had to the hay raised on the farm being that of *chattel mortgagees*, that was the title which passed to an assignee, by their assignment to him of the counterpart of the lease, as between such assignee and the tenant.

Held, also, that the lease never having been filed as a *chattel mortgage*, as required by the statute to make it valid as against the creditors of the lessee, and the tenant being in possession of the farm, when the hay was levied upon and sold by his creditors, on execution, no action could be maintained by the assignee of the lease against the sheriff, to recover the value thereof, in the absence of any default in the payment of rent.

MOTION by the plaintiff for a new trial, upon a verdict for the defendant under the direction of the judge who tried the cause.

On the 5th day of November, 1866, Miller & Rumble leased to one Barton E. Tift, a dairy farm in the town of Pinckney, Lewis county, with forty cows and some other personal property, for the term of two years from December 1, 1866, at the yearly rent of \$750. The lease provided that the milk of the dairy should be taken to a neighboring cheese factory to be manufactured into cheese, and when sold five-eighths of the proceeds to be paid to the landlord upon the rent, and at the last sale of cheese the tenant was to pay the balance of rent, if any remained due. The lease also contained the following clause:

"The party of the first part are to have full title, with the privilege of taking possession, at any and all times, of any and all products of the farm in payment of the balance due on the rent at the last factory sale, at which such milk is drawn, and left unpaid by the party of the second part."

The lease also provided that the tenant "should feed

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out the hay and straw in a careful and farmerlike manner, to cut and get in good order all the hay," and in case of deficiency of hay or straw on the farm to feed the stock, then the landlord was to furnish such deficiency.

The landlord also reserved in the lease the right to re-enter and take possession of the farm at any time between the first day of December and the first day of March, in each year, in case he sold the farm during the term of the lease. Tift, the tenant, went into the possession of the farm and personal property shortly after the execution of the lease. On the 8th day of July, 1867, Miller & Rumble, the lessors, sold the farm and assigned their interest in the lease and personal property to the plaintiff in this action. The plaintiff never had possession of the farm or personal property, but Tift continued in possession as tenant under the lease from Miller & Rumble. On the 9th of August, 1867, Ballard & Hanchett, of Watertown, recovered a judgment in the Supreme Court against Tift, the tenant, for \$630, upon which an execution was issued to the defendant as sheriff of Lewis county, August 10, 1867, by virtue of which he levied upon and sold about sixty tons of hay on the farm, raised thereon by Tift, and being then in his actual possession, he being still in possession of the farm.

The plaintiff thereupon brought this action against the sheriff for a wrongful taking and conversion of the hay, claiming title to it under the clause in the lease, and also claiming that the title to the hay never passed to or vested in the tenant, but that the hay was to remain on the farm for the purpose of feeding the stock.

The cause was tried at the Lewis circuit in October, 1867, before Justice MULLIN and a jury, and the foregoing facts were proved, and it was conceded by the plaintiff that the lease had never been filed as a chattel mortgage.

At the close of the evidence the judge directed a verdict for the defendant, with leave to the plaintiff to move to set it aside, and for a new trial, at the general term.

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A. J. Mereness, for the plaintiff.

D. O'Brien, for the defendant.

By the Court, FOSTER, J. The plaintiff, as between him and Tift, had only the interest in the hay in question of a chattel mortgagee; for such in fact was the clause in the lease from Miller & Rumble to Tift, by which it was stipulated that Miller & Rumble were "to have full title, with the privilege of taking possession at any and all times, of any and all products of the farm, in payment of the balance due on the rent at the last factory sale."

The lease to Tift of the premises was absolute, and with the exception of the proceeds of three-fifths of the milk to be sold to the cheese factory, he was the owner, and was entitled to the possession of it, and the clause above set forth was a mere security for money; and necessarily in the nature of a mortgage. But it is argued by the counsel for the plaintiff that it was not a mortgage, and that the title to such hay as should grow on the place did not pass to Tift, because he stipulated in the lease that he would cut and get in in good order all the hay, and that he would feed out the hay and straw in a saving manner, and because it was further stipulated that he was "to have the privilege of keeping a span of horses all the time, and a third horse during haying," which, it is claimed, is inconsistent with the idea that the title to the hay was to be in him.

The answer to the argument is perfectly manifest. By the terms of the lease, Miller & Rumble bound themselves to supply all such hay as was necessary to winter the stock after the hay and straw raised on the place was exhausted; and therefore they were interested in limiting the amount of stock to be kept, and in providing that all the hay and straw should be saved and carefully used, as though the title to it was in them.

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The covenant on the part of Tift to save all the hay and straw, and to carefully feed it to the stock, and to keep but two horses except during haying time, was only an agreement binding on him at law, and if he chose to keep more horses, or to sell or improvidently use the hay, it did not authorize Miller & Rumble to interfere with it, either by taking possession of it, (for they were entitled to possession *only* as security for the unpaid rent,) or to restrain such use of it by injunction.

If so improperly used, Miller & Rumble had but two remedies. They could refuse to supply the deficiency thus caused, or sue at law upon the broken covenants.

As the only title that Miller & Rumble had to the hay was that of chattel mortgagees, that was the title they transferred to the plaintiff by the assignment to him of the counterpart of the lease. It was never filed as required by the statute, to make it valid as against the creditors of Tift. Tift was in the actual possession when the levy and sale took place, and therefore the plaintiff cannot recover. This question strikes at the foundation of the plaintiff's claim. There is no claim that the lease had ever been filed; and even if there were errors committed on the trial, a new trial would be useless, and I therefore see no necessity for examining the other questions raised in the case.

A new trial should be denied, and judgment entered upon the verdict, for the defendant.

Judgment accordingly.

[ONONDAGA GENERAL TERM, October 6, 1868. *Bacon, Morgan, Mullin and Foster, Justices.*]

BENNETT vs. BUCHAN and others.

In September, 1861, the defendants, partners under the firm name of B. & Co., recovered a judgment for \$1088.46 against D. and others composing the firm of D., G. & Co. On the 19th of March, 1863, after the dissolution of the latter firm, G., one of the partners therein, on paying ten per cent of the amount of the judgment, obtained from R., one of the firm of B. & Co., a release executed by him in the name of the firm of G.'s individual liability on the judgment, under the "act for the relief of partners and joint debtors," passed April 18, 1838, for which release he paid ten per cent of the whole amount of the judgment. On the 15th of February, 1866, the judgment was assigned to the plaintiff, by B., for the consideration of \$100, by an instrument executed by him in the name of the firm of B. & Co., but without any authority therefor from B., or subsequent assent by him. The assignment contained a covenant "that there is now due on said judgment the sum of \$1088.46 and interest from September 2, 1861, and that they (the assignors) will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment." It appeared that G. the debtor so released, was solvent and able to pay the whole debt, but that the other judgment debtors were either dead or insolvent, except one, from whom the plaintiff had collected \$102.16.

Held, 1. That the assignment was effectual to vest in the assignee all the interest and title of B. & Co. in the judgment, but that R., not having signed the same, was not liable on the *covenants* contained in it.

2. That the measure of damages in an action by the plaintiff as assignee, against B. for breach of the covenant, was ten per cent of the amount of the judgment, being \$108.84, and interest, without applying in reduction thereof the amount collected by the plaintiff from one of the judgment debtors.
3. That the covenant, in the assignment, that the whole amount of the judgment was due, was not to be construed to mean that none of the judgment debtors had been released or discharged from it.

It is not necessary to the validity of a release or discharge of one of the co-partners of a dissolved firm from a debt or liability of the partnership, that he should have made actual payment of any part thereof to the creditor. It is enough that for any reason the creditor discharges or releases him in the terms required by the laws of 1838, ch. 257, and laws of 1845, ch. 848. It makes no difference with the rights or obligations of his associate debtors, whether he obtained the discharge with or without payment; unless such payment exceeds his proportionate part of the whole demand; for the act of 1838 makes him responsible over to his co-debtors, notwithstanding the discharge by the creditor, to the full amount of his proportionate share, less what he has paid to the creditor, if any thing, upon obtaining such discharge. *Per* FOSTER, J.

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A PPEAL by the defendants from a judgment entered upon the report of a referee.

The action was brought to recover damages alleged to have been sustained by the plaintiff, by the breach of a covenant of warranty made by the defendants on the sale and assignment to her of a judgment which they held against the firm of Dorans, Gillett & Co.

The defendants were copartners doing business in the city of New York, under the firm name of James Buchan & Co. On the 2d of Sept. 1861, they recovered a judgment for \$1038.46 against Erasmus D. Doran, James E. Doran, Allen H. Gillett and Homer W. Wooster, composing the firm of Dorans, Gillett & Co., all of Syracuse, and the judgment was on that day docketed in the clerk's office of Onondaga county. On the 19th of March, 1863, and after the dissolution of the firm of Dorans, Gillett & Co., Gillett, one of the copartners, obtained from Buchan & Co. a release from his individual liability on the judgment, under the "act for the relief of partners and joint debtors," passed April 18, 1838, (*Laws of 1838, ch. 257,*) for which release he paid ten per cent of the whole amount of the judgment; and no more was ever paid to Buchan & Co. thereon. At the same time of the rendition of this judgment, eleven other judgments were rendered and docketed against the same defendants in favor of divers plaintiffs, for the sum, in all, including the said judgment, of \$7366.52, and were all equal liens upon the real estate of said firm of Dorans, Gillett & Co., and upon the individual real estate of each of such defendants.

The release to Gillett was executed by Stephen Rich, in the name of the firm of James Buchan & Co., and was filed in the clerk's office of Onondaga county, at Syracuse, October 7th, 1865, but was entered in the docket of judgments under the letter G, only. Mr. Rich dissolved his connection with the firm on the 28th of January, 1865, leaving Buchan in possession of the business and assets.

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And before that time, the firm, considering the judgment which they so held worth little, if any thing, charged it over to profit and loss. Previous to August, 1865, James E. Doran, one of the said judgment debtors, died, and in that month Anna Doran, the mother of the two defendants Doran, died intestate, leaving real estate worth \$2800, and leaving three living children, and the heirs of a fourth, her heirs at law.

On the 15th of February, 1866, John C. Bennett, of Syracuse, the husband of the plaintiff, who is the sister of the two Dorans, made an offer to James Buchan & Co., by letter, to pay \$100 for an assignment of the judgment, describing it as a judgment against Erasmus E. Doran, in which he said, "I will give you \$100 for the judgment. If you desire to accept my proposition, execute an assignment of the judgment in question to H. Amelia Bennett, and forward the same to me by express, C. O. D." This letter was answered on the part of Mr. Buchan, with a request to Mr. Bennett to procure and send to him a copy of the docket of the judgment, and Bennett went to the clerk's office and procured a copy and sent it to Buchan by mail. The copy sent to Buchan was taken from the docket under the letter "D," and did not show that Gillett had been released from the judgment. Buchan thereupon executed the assignment to the plaintiff, in the firm name of James Buchan & Co., and sent it to Mr. Bennett, and received the payment of the \$100 therefor. The assignment contained a covenant, "that there is now due on the said judgment the sum of ten hundred and thirty-eight dollars and forty-six cents, and interest from September 2, 1861, and *that they will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment.*" The referee found that the release of the judgment to Gillett was made in good faith, and that the assignment to the plaintiff was made in good faith, and without any intent to defraud any one, and without

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thinking of the release previously made to Gillett, and that the same was executed by Buchan without any authority therefor from Rich, and was never assented to by him afterwards.

The referee also found as matter of fact, that the plaintiff, when she took the title to the judgment by assignment, was not aware that Gillett had been released.

Several other facts were found by the referee, but the only ones material to the questions here were, that Erasmus D. Doran was not solvent so that the judgment could be collected of him, but that Gillett was of sufficient ability, so that it could have been collected of him but for the release. The referee reported in favor of the plaintiff, for the full amount of the judgment and interest, less the sum of \$102.16, this latter sum being the amount, with interest, of what the plaintiff, after taking the assignment, had succeeded in collecting by an execution, from E. D. Doran, leaving a balance of principal and interest of \$1423.73, for which he ordered judgment in favor of the plaintiff. Judgment was entered thereon against Buchan, with costs, the complaint being dismissed as to Rich, and Buchan appealed.

William J. Hough, for the plaintiff.

John M. Emerson, for the defendants.

By the Court, FOSTER, J. The assignment of the judgment having been made after the dissolution of the co-partnership of James Buchan & Co. by Mr. Buchan alone, and without the special authority or assent of Rich, it is contended that in any event, only the title of Buchan to the amount of one half thereof passed to the plaintiff; and that, therefore, no recovery can be had for more than one half of it, less the one half of what the plaintiff has already realized thereon.

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The authorities cited to support the proposition fail to do so, (*Sanford v. Mickles*, 4 John. 224, &c., and *Geortner v. Trustees*, 2 Barb. S. C. R. 625,) and only enunciate the principle, that after the dissolution of a copartnership, one of the partners cannot dispose of the partnership choses in action without the authority or assent of the other, so as to make him liable upon any covenants or obligations which he assumes on such transfer.

In *Sanford v. Mickles*, the transfer by one of the partners was of a negotiable note, which was payable to order, and was indorsed with the firm name by the partner who transferred it, and all that the court held, was, that he could not create by such indorsement any liability against his late copartner.

It is true that the court, Yates, J., said, "it is impossible to separate the right to indorse a bill by one passing the title, from the legal responsibility on all those having an interest in it," and that one could not transfer the note; but I think there is no doubt that he could, by an indorsement of the note in the firm name without recourse, transfer the title thereto to the full extent that he could have done in respect of any other of the partnership property. And although the language of the court is more general and broader than the case called for, the decision was only that the other copartners were not liable as indorsers of the note. And in *Geortner v. Trustees*, while one of the head notes states the rule to be that "after the dissolution of a partnership, all the partners must unite in a transfer of a partnership security, in order to vest the title in the transferee," it will be seen by an examination of the case, that the court only decided that one partner cannot so transfer it, for his own private purposes, other than the settlement of and for the benefit of the copartnership.

One copartner, after the dissolution of the firm, may release a debt, and it will be binding on all the late firm.

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(*Pierson v. Hooker*, 3 John. 68.) He may assign a bond belonging to the firm after the partnership is dissolved. (*Collyer on Part.* § 546.) He may lawfully assign a demand due to the partnership, after its dissolution, (*Milliken v. Loring*, 37 Me. Rep. 408,) and if there be no agreement to the contrary, such partner is presumed to have authority to dispose of the partnership *property*, to collect, adjust and pay debts, and give proper acquittances; but to have no power to increase or change the prior obligations of the partners. (*Van Keuren v. Parmelee*, 2 N. Y. Rep. [Comst.] 525, 526.)

It must be conceded that if Buchan is liable at all on the covenant contained in the assignment, he is at least liable to the amount of the one tenth of the judgment which was paid thereon when the release of Gillett was obtained; for he covenanted expressly that the whole amount of the judgment remained unpaid, and being liable to that extent, at least, he cannot claim that the amount collected upon the judgment by the plaintiff should apply for his benefit and in discharge of his obligation for that amount. He transferred the whole judgment, and having covenanted that the whole was due, the plaintiff has the right to apply the amount she collected on the residue of the judgment, and hold him responsible upon the broken covenant to the full extent of the damage occasioned by the breach.

A more serious question is, whether the appellant was liable for the whole amount found by the referee.

It must be conceded, upon the findings of the referee, that there was no fraud on the part of Buchan; that he was not aware, at the time when he executed the assignment, of the release of Gillett from the debt, and that he acted upon the transcript of the docket, which was procured and sent to him by the agent of the plaintiff; and if he is liable for the residue of the judgment, it must be because, independent of the covenant or guaranty, the

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law casts such implied obligation upon him, or because of the terms of the covenant which he executed.

If the terms of the assignment had been general, stating the amount thereof, and containing no covenants, I think the law would imply a warranty that the whole amount so expressed was due, and that it was due from all the parties against whom it was rendered, if their names were included in the assignment. (*Furniss v. Ferguson*, 34 N. Y. Rep. 485.) But the counsel for the plaintiff does not claim on the argument before us, that that rule applies to this case, and I think it does not, because of the express covenants contained in the assignment. The right, therefore, must depend upon the language of the covenant itself. The parties have made their agreement in writing, and it contains the whole agreement. It cannot be added to by implication, but must be construed by its terms.

The language of the covenant is, "that there is now due on the said judgment the sum of ten hundred and thirty-eight dollars and forty-six cents, and interest from September 2d, 1861, and that they will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment." The counsel for the plaintiff says that this language should be construed the same as if it read, and that they *had not collected or received, &c.*, and "had not released or discharged the same, or *any of the defendants therefrom.*" This proposition is correct, so far as it requires the covenant to be understood as if it read that they had not collected or received any part of it, because that is the clear construction from the language of it, which states that the whole amount is now due. For it could not be all due if any portion of it had been paid by one or more of the judgment debtors. So, too, the counsel is correct in claiming that it is the same as if it read that the assignors had not released or discharged any portion of the amount of the judgment, for such is the legal reading of the instrument as it is; for if any portion

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of the amount was discharged, the whole amount could not be due. But the real question is, whether the covenant can be construed, as such, to mean that *none of the debtors had* been released or discharged from it.

It is not necessary to the validity of a release or discharge of one of the copartners of a dissolved firm from a debt or liability of the partnership, that he should have made actual payment of any part thereof to the creditor. It is enough that for any reason the creditor discharges or releases him in the terms required by the laws of 1838, chap. 257, and laws of 1845, chap. 348; and it makes no difference with the rights or obligations of his associate debtors, whether he obtains the discharge with or without payment, unless such payment exceeds his proportionate part of the whole demand; for the act of 1838 makes him responsible over to his co-debtors, notwithstanding his discharge by the creditor, to the full amount of his proportionate share, less what he has paid to the creditor, if any thing, upon obtaining such discharge.

The judgment might be in force to the full amount against the other debtors, notwithstanding Gillett had been released. And, therefore, the mere fact of his release if he had paid nothing, would not have lessened the amount of the judgment. It might all be due, according to the language of Buchan's covenant. And if nothing had been paid by Gillett, his discharge would not have been a breach of the express terms of it. Now the covenant being in writing, I think if the plaintiff would claim that it should now be read, that none of the judgment debtors were discharged, he should have had it drawn so as to read so when it was executed. The equity of the plaintiff is very weak, upon all the facts of the case, and we should not strain the construction in her favor to enable her to make a large speculation out of one who, upon the proofs of the case, acted honestly and fairly in the transaction. It is enough, I think, that he be held re-

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sponsible for what, by the terms of the assignment, he assumed; and that will make the plaintiff entirely whole, and leave a large judgment in her hands to be collected of those of the defendants therein who have not been charged.

If, however, I am wrong in my conclusions on this branch of the case, then I think the rule of damages applied by the referee is the correct one.

But I think that all the plaintiff is entitled to recover is the one tenth of the judgment, being \$103.84, and interest thereon from September 2, 1861. And unless the plaintiff elects to reduce her damages to that amount, without costs of appeal to either party, then the judgment must be reversed and a new trial ordered, against Buchan, with costs to abide the event, with the order of reference vacated.

The case also presents pretty strong ground for a new trial, as being upon a report against the weight of evidence. Certainly, upon the evidence returned to us, I should not have hesitated to believe that Bennett, while he was the agent of the plaintiff, and negotiating the purchase of the judgment, did in fact have full information that Gillett had been discharged from the judgment; and when we remember that the discharge was entered on the docket against the name of Gillett, and that Bennett himself had access to the book of dockets, and actually procured the transcript upon which the assignment was predicated, it seems to me that he was guilty of gross negligence, in not looking under the letter G, as well as that of D. But I have some doubts whether it is our duty to set aside the report on that ground, and am therefore for disposing of the case upon the grounds previously stated.

Judgment accordingly.

[ONONDAGA GENERAL TERM, October 6, 1868. *Foster, Mullin and Morgan, Justices.*]

MARGARET FLANAGAN vs. BRIDGET TINEN and TIMOTHY
TINEN, her husband.

For an assault and battery committed by the wife alone, both the husband and wife are liable; and judgment being rendered against both, the execution must follow it, and direct the collection of damages and costs out of the property of both.

Such judgment becomes a lien on the real estate of which the husband is owner, at the time of the rendition thereof, and on such as he may thereafter acquire. His death will not impair such lien, nor the right of the plaintiff to enforce it against the land.

If the husband has real estate, and an execution issued during his lifetime is returned by the sheriff *nulla bona*, the court will cancel such return, and take the execution off the files and return it to the sheriff, to the end that he may proceed and sell the real estate by virtue of it.

Where a *fi. fa.* has been issued within five years from the recovery of a judgment, and returned wholly unsatisfied, no leave from the court is necessary to the issuing of a second execution.

The case of *Allen v. Clark*, (11 *How. Pr. Rep.* 218,) in which it is intimated that in no case can an execution issue, after the death of the defendant therein, without leave of the court, disapproved.

MOTION for leave to issue execution. The action was brought, in October, 1864, to recover damages for an alleged assault and battery, committed by the defendant, Bridget Tinen. Issue was joined, and a trial had in March, 1866, and a verdict rendered in favor of the plaintiff for \$50 damages, for which sum, with costs, judgment was entered on the 1st day of March, 1866. On the same day a *fi. fa.* was issued on said judgment, to the sheriff of Jefferson county, which, on the 7th of January, 1867, was returned wholly unsatisfied. On the 13th day of June, 1866, Timothy Tinen, one of the defendants, and the husband of the said Bridget, died, leaving him surviving the said Bridget and four children his heirs at law, all of them under fourteen years of age. On the 15th of November, 1867, the said Bridget was, by the surrogate of Jefferson county, appointed administratrix of her deceased husband. There was no personal property belonging either to said Bridget or the estate, but the intestate died seised of real

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estate, in said county, of sufficient value to pay said judgment. On the 20th of November, 1867, a petition was presented by the plaintiff to the surrogate of Jefferson county for leave to issue execution on said judgment, the prayer of which was granted.

The plaintiff now moved for leave to issue execution, on the ground that when the defendants, in a judgment, or one of them, has died, the consent of the court in which the judgment was recovered, as well as that of the surrogate, to the issuing of an execution, is necessary.

Moore & McCartin, for the plaintiff.

MULLIN, J. The injury for which the action was brought was done by the wife alone; and for that injury both the husband and wife were liable. (1 *Chitty's Pl.* 82.) The judgment being against both, the execution must follow it, and direct the collection of damages and costs out of the property of both.

The judgment became a lien on the real estate of which the husband was owner at the time of the rendition thereof, and on such as he thereafter acquired. The execution having issued during his life, it was competent for the sheriff to have seized and sold the real estate, and out of the avails to have paid the judgment. Why it was returned *nulla bona*, in January, 1867, when there was real estate out of which satisfaction might have been obtained, is not disclosed. Had the sheriff performed his duty, this application would not have been necessary.

The proper relief, under the circumstances, would be to cancel the return of *nulla bona*, take the *fi. fa.* off the files, and return it to the sheriff, to the end that he might proceed and sell the real estate by virtue of it.

The death of Timothy did not impair the lien of the judgment, nor the right of the plaintiff to enforce it

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against the land bound by its lien. The title, therefore, passed to the heirs charged with the lien.

But if the question is now to be considered as if no *fi. fa.* had issued during the life of the judgment debtor, then it can only issue at the end of a year from the death and by permission of the surrogate. (2 *R. S.* 2d ed. 368, § 27. 3 *id.* 5th ed. 642, § 30.)

Permission from the court in which the judgment was recovered, to issue execution, is only necessary after the expiration of five years from the recovery of the judgment; and then only in the event that an execution has not been issued within five years. (3 *R. S.* 5th ed. 642, § 1. *Code*, §§ 283, 284.)

By the last clause of the first paragraph of section 284, it is declared that leave to issue execution shall not be necessary when an execution has been issued within the five years and returned unsatisfied, in whole or in part.

In this case the *fi. fa.* was issued within five years, and has been returned wholly unsatisfied; therefore, by the very terms of the section under consideration, leave from this court is not necessary.

I have been referred to the case of *Alden v. Clark*, (11 *How.* 213,) in which the general term of the fourth district intimated that in no case could an execution issue after the death of the defendant therein, without leave of the court. The remarks of the learned judge who delivered the opinion of the court, in that case, as to the necessity of leave within five years from the entry of judgment, were not called for by the case before him; and it seems to me quite clear that, as the law then stood, execution might issue, by leave of the surrogate, after a year, without leave from the court in which the judgment was recovered. Chapter 295 of the Laws of 1850 was then in force.

But, however this may be, the clause of section 284 of the *Code*, cited *supra*, was not then enacted. Since

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its enactment, there cannot, it seems, be any necessity for leave from the court, in a case like this.

The motion is therefore denied.

[JEFFERSON SPECIAL TERM, October 19, 1868. *Mullin*, Justice.]

MILLER, executor, &c., vs. THE PRESIDENT, DIRECTORS AND
COMPANY OF THE JUNCTION CANAL COMPANY.

The defendant, a corporation formed under and pursuant to chapter 194 of the laws of 1846, (*Laws of 1846, p. 222*), erected a dam across a river, which abutted upon the lands of W., and not being able to obtain by voluntary donation or purchase from him the land and water privileges it required, nor to agree with him as to the compensation to be paid him for the injury caused by the dam, entered into an agreement in writing, with him, by which the parties, pursuant to sections 9 and 10 of said act appointed three persons impartially to estimate and determine the price to be paid by the defendant to W. for the said real estate, and for the injury caused by the dam; the said persons being declared to have all the powers and to be subject to all the duties, in the premises, which in and by said act were conferred and enjoined. The arbitrators met and heard W.'s evidence, but before the cause was finally submitted to them, the defendant served upon them and upon W. notices under seal, revoking the powers of the arbitrators; whereupon they refused to pass upon the matters submitted, or to make any report. *Held* that the act of the defendant in making and serving the notices of revocation was a breach of the agreement to submit; and that those acts having induced the three persons named to refuse to make a report, the executor of W. could recover of the defendant all the damages he had sustained in consequence of such refusal, such as the expenses incurred by him in employing counsel, procuring the attendance of witnesses, &c.

There is no valid objection to regarding persons appointed by parties pursuant to the above statute as arbitrators, although they are not designated in the act either as appraisers, or referees, or arbitrators; and it seems they should be deemed arbitrators, and therefore authorized to hear evidence.

THIS was an action to recover the expenses incurred by the plaintiff's testator, John G. Warren, deceased, pursuant to an alleged submission to arbitration, which

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the defendants revoked before the cause was finally submitted to the alleged arbitrators.

The action was tried before Justice BALCOM without a jury, at the Chemung circuit in September, 1856, when judgment was directed in favor of the plaintiff for \$173.94 damages, besides costs. After the entry of judgment in conformity with the decision of the judge, the defendants appealed to the general term of this court.

Daniel W. Gillett, for the plaintiff.

James L. Woods, for the defendants.

By the Court, BALCOM, P. J. The defendants are a corporation, formed under and pursuant to chapter 194 of the laws of 1846. (*Laws of 1846, p. 222.*) John G. Warren, now deceased, owned land adjoining the Chemung river, in the county of Chemung, through which the defendants constructed a canal; and they erected a dam across that river that abutted on the lands of Warren; and the latter claimed he was injured by means of the dam. The defendants could not obtain by voluntary donation or purchase from Warren the real estate and water privileges necessary for constructing, maintaining and repairing their canal and works connected therewith; nor could the defendants agree with Warren as to the compensation to be paid him for the injury caused by means of the dam. Warren and the defendants made an agreement in writing under seal, dated the 23d day of June, 1854, which recited the foregoing facts, and provided that the parties, pursuant to sections nine and ten of the above mentioned act of 1846, appointed Mordecai Rickey, Orrin Eddy and John Haggerty, "impartially to estimate and determine the price" to be paid by the defendants to Warren for said real estate; and "impartially to assess and determine the compensation" to be paid by the defendants to Warren, "for the injury caused to him by means of said dam; the

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said persons having all the powers, and subject to all the duties in the premises, as in and by said act conferred and enjoined."

Warren employed counsel, subpoenaed witnesses and prepared for the hearing and investigation of the matters in the agreement above mentioned. Rickey, Eddy and Haggerty met and heard the evidence; but before the cause was finally submitted to them, the defendants served upon said three persons, and upon Warren, notices under seal, revoking the powers of said three persons under the submission made to them, dated the 23d day of June, 1854, above described.

After the service of such notices Rickey, Eddy and Haggerty refused to make a report, or to pass upon and determine the matters mentioned in said submission. Warren paid the fees of said persons under said submission, which, with the fees of his witnesses and counsel, amounted to the sum of \$173.94, for which the plaintiff recovered in the action.

The defendant moved for a nonsuit, on the trial: "1st. Upon the ground that the paper dated June 23, 1854, was not, and did not amount to an arbitration and submission to arbitration. 2d. Upon the ground that said writing of June 23d was still in force, and the defendants had no power to revoke the powers conferred upon said Eddy, Rickey and Haggerty thereby, and the attempt to do so was a nullity." Which motion was denied, and the defendants' counsel excepted.

The judge directed and ordered judgment for the plaintiff for the sum of \$173.94 damages.

The defendants excepted to the decision of the judge as follows: "1. To his decision that the defendants were not entitled to a nonsuit, and denying their motion for judgment of nonsuit. 2d. To his decision that the plaintiff was entitled to recover of the defendants the damages by reason of the matters alleged in the complaint in the

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action, and directing and ordering judgment against the defendants in the action."

The holding at the trial, that the plaintiff was entitled to recover, was in conformity with the decision of the general term of this court, made at Delhi, in July, 1856, setting aside the nonsuit that was granted on the first trial of the action.

The point made by the defendants' counsel on this appeal is, that Rickey, Eddy and Haggerty were not arbitrators, but a mere statutory tribunal, and their powers could not be revoked by one of the parties—that the defendants' notice of revocation was a nullity; and that it was Warren's own folly that he did not proceed with the hearing and obtain a report.

A good answer to this point is that the arbitrators, as I shall call them, refused to proceed and make a report in consequence of the defendants' notices.

The acts of the defendants, in making and serving notices of revocation upon Warren and the arbitrators, were a breach of the agreement to submit the matters in controversy to the decision of the arbitrators. Those acts induced the arbitrators to refuse to make a report.

It is provided by section nine of the act under which the arbitrators were appointed by the parties, "if a majority of the persons appointed by the parties shall not, within thirty days after receiving notice of their appointment, file a report of their estimate in the office of the clerk of the county where the lands lie," then either party may apply to the court for a venire to the sheriff to summon a jury to ascertain and report to the court the price to be paid the claimant for the real estate and water privileges taken by the defendants, and ascertain and report to the court the compensation to be paid the claimant for injuries by means of any dam being erected by the defendants. (*Laws of 1846, pp. 226 and 227.*)

When the thirty days allowed the arbitrators for filing
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their report expired, the defendants acquired the right to apply to the court for a venire and have a jury pass upon the matters mentioned in the submission they had revoked.

Warren sustained the damages recovered by the plaintiff in consequence of the acts of the defendants; which acts were wrongful if the arbitrators could have gone on and made a report, notwithstanding the same. The refusal of the arbitrators to make a report, should be deemed the result of the defendants' acts.

Persons, appointed by parties to make a report pursuant to the act referred to, are not designated in the act as appraisers, or referees or arbitrators. But although they be appraisers or referees, and not arbitrators, I see no valid objection to the recovery in this action. The three persons, appointed by the parties, were "impartially to estimate and determine the price to be paid by said company [defendants] to said Warren, for said real estate; and impartially to assess and determine the compensation to be paid by said company to said Warren, for the injury caused to said Warren by means of said dam." The parties agreed that such three persons should do those acts; and the agreement was authorized by sections nine and ten of the act referred to. When the defendants violated the agreement and prevented the three persons named in it going on and making a report, the defendants became liable to Warren for all the damages sustained by him in consequence of the refusal of such three persons to make a report; and those damages the plaintiff has recovered in this action.

But there is no valid objection to regarding persons, appointed by parties pursuant to the act referred to, as arbitrators. There is no provision in the act for the review of their decisions. If their decisions or reports can be questioned, they must be reviewed as awards. An arbitrator is a disinterested person, to whose judgment and decision

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matters in dispute are referred. (*Wharton's Law Dic.* p. 60.) According to *Bouvier*, an arbitrator is "a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same. Arbitrators are so called because they have generally an arbitrary power, there being, in common, no appeal from their sentences, which are called awards." (1 *Bouv. Law Dic.* p. 115.)

The parties regarded Rickey, Eddy and Haggerty as arbitrators, and acted accordingly, until after their authority was revoked by the defendants. And I am of the opinion we should deem them arbitrators. (*See Merritt v. Thompson*, 27 *N. Y. Rep.* 225.) They were "impartially to estimate and determine the price to be paid" for the land taken, and "impartially to assess and determine the compensation to be paid" for the injury caused to Warren by means of the dam. The act did not expressly authorize them to hear evidence; but if they were arbitrators, they had that right, and they exercised it.

It is clear if Rickey, Eddy and Haggerty were arbitrators, the plaintiff was entitled to recover the damages Warren sustained in consequence of the revocation of their authority by the defendants.

For these reasons I am of the opinion no error was committed on the trial, and the judgment in the action should be affirmed, with costs.

So decided.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, Boardman, Murray and Parker*, Justices.]

MARY GARRITY vs. NICHOLAS H. HAYNES.

Where, by mistake, land purchased by a married woman, is conveyed to her husband, instead of herself, the wife, in an action brought by her against the sheriff to recover the value of hay and cows seized by him upon execution against the husband, as being the property of the latter, may prove the mistake in the deed, and that it was rectified by the grantee conveying the farm to a third person who has conveyed it to the plaintiff.

In such a case, after the mistake is rectified, the wife has the legal as well as the equitable title to the farm. And although previous to that time the husband held the legal title, by virtue of the deed to him, it was a mere naked title without interest, and one upon which a judgment against him could not fasten as an effective lien.

The wife, as the owner in equity of the farm, is entitled to the issues and profits thereof, and the fact that her husband resides on the farm with her, and assists her in cutting and curing the hay, will not make him the owner of the same.

The cows were purchased on credit, and a note given for the price, by the wife and another person, which was subsequently paid by the wife, but not until after the sheriff levied on the cows. The court charged the jury, "if the cows were purchased at the request of the plaintiff and as her property, and for her, she having subsequently paid for the cows, they may have been her separate property and she entitled to recover for them." *Held*, that this part of the charge was correct.

The court refused to charge the jury that "as to the cows, if the note given for them by the husband and another had not been paid at the time of the levy, then the title to the cows was not in the plaintiff; there being no evidence that she had ever promised to pay the note." *Held* that the request was properly refused.

Held, also, that if there was any doubt as to the right of the plaintiff to maintain the action for the levy upon the cows and hay, yet if there was no fraud in the case, or intention to defraud the creditors of the husband, the right of the plaintiff to recover for the subsequent sale of the cows and hay, was clear; she then being entitled to the possession of the property, and having the legal as well as the equitable title thereto, as against her husband.

ACTION to recover the value of a quantity of hay and the value of two cows, which the complaint alleged the defendant wrongfully seized and converted, on or about the 7th day of January, 1867. Defense, that Clark Rogers recovered a judgment on the 15th day of July, 1859, in this court, against Patsey Garrity, which was duly docketed in Cortland county the day it was recovered.

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That on or about the first day of November, 1866, the defendant was sheriff of Cortland county, and continued to be such sheriff until after the alleged seizure and conversion of the hay and cows in dispute, in January, 1867. That on or about the first day of November, 1866, the defendant, as such sheriff, received an execution on said judgment, by virtue of which he levied upon the hay and cows, and sold the same, the hay and cows being the property of Patsey Garrity. Patsey or Patrick Garrity (the latter being his true name) married the plaintiff before said execution was issued. The hay and cows were on a farm in Cortland county, at the times they were levied upon and sold; on which farm the plaintiff and her husband were living at those times. The plaintiff claimed that she was the owner of the farm and the hay and cows.

The action was tried at the Cortland circuit in January, 1868, when the jury rendered a verdict in favor of the plaintiff for \$181.12 damages.

The defendant took exceptions on the trial, which the judge directed to be heard in the first instance at the general term of this court.

Shankland & Couch, for the plaintiff.

Duell & Foster, for the defendant.

By the Court, BALCOM, P. J. The plaintiff agreed for the farm and to pay \$1600 therefor. She paid \$600 of the purchase price with her own money. She made the purchase of one Perry, for herself. But by mistake of the person who drew the deed, it was made to Patrick Garrity, the husband of the plaintiff. It was dated March 1st, 1866. The balance of the purchase money not paid down by the plaintiff was secured by a mortgage on the farm to Perry, that was executed by the plaintiff and her husband. The plaintiff's husband never paid any part of the con-

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sideration for the farm. The deed from Perry, and the mortgage back to him, were drawn by a justice of the peace. Neither the plaintiff nor her husband could read.

The defendant, as sheriff, levied the execution against Patsey Garrity upon the hay and cows on the farm on the 14th or 15th day of November, 1866.

The court permitted the plaintiff to prove that the farm was in reality her property at the time the levy was made, and that the deed was given to her husband by mistake. This was permitted, for the purpose of allowing the plaintiff to show whether she was the owner of the hay which was cut upon the farm.

The defendant's counsel excepted to the admission of the evidence showing the alleged mistake respecting the deed.

The plaintiff testified that the first knowledge she had of the mistake in the deed was derived from the defendant at the time he made the levy. She then told the defendant she owned the farm and the hay and cows. After the levy was made, and before the hay and cows were sold, the mistake in the deed was rectified by Patrick Garrity conveying the farm to a third person, who reconveyed it to the plaintiff. This evidence was objected to by the defendant's counsel, and he excepted to the decision admitting it.

The hay and cows were sold by the defendant on the 7th day of January, 1867.

If the rule still existed that a written instrument cannot be reformed except in a direct action for that purpose, it is not applicable to the questions in this case. For the mistake in the deed from Perry to the plaintiff's husband was rectified by the parties before the property in question was sold, and there was no necessity for such an action.

It was competent for the plaintiff to prove, in this action, the mistake in the deed from Perry, and that it was rectified by the grantee conveying the farm to a third person,

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who reconveyed it to the plaintiff. (*See* 12 *N. Y. Rep.* 156 and 266; 15 *id.* 374; 17 *id.* 270; 23 *id.* 357; *Lounsbury v. Purdy*, 16 *Barb.* 376; *S. C.*, 18 *N. Y. Rep.* 515; *Siemon v. Schurck*, 29 *id.* 598.)

When the mistake was rectified, the plaintiff had the legal as well as the equitable title to the farm. And although previous to that time the husband of the plaintiff held the legal title to the farm, by virtue of the deed to him, it was a mere naked title, without interest, and one upon which a judgment against him could not fasten as an effective lien. (*Siemon v. Schurck*, 29 *N. Y. Rep.* 598.)

The plaintiff, as the owner in equity of the farm, was entitled to the issues and profits thereof. The fact that her husband resided on the farm with her, and assisted her in cutting and curing the hay, did not make him the owner of the same. (*Buckley v. Wells*, 33 *N. Y. Rep.* 518. *Gage v. Dauchy*, 34 *id.* 293.)

The jury were instructed to give the defendant the benefit of the labor of the husband of the plaintiff, so far as it increased the value of the hay. Whatever the husband's labor in cutting and curing the hay was worth, must have been allowed the defendant by the jury. Whether the plaintiff could not have complained of this instruction, it is unnecessary to inquire.

The cows were purchased on credit. A note was given for them by the husband of the plaintiff and one Ryan. The plaintiff paid the note; but not until after the defendant levied on the cows. The court charged the jury, "if the cows were purchased at the request of the plaintiff, and as her property and for her, she having subsequently paid for the cows, they may have been her separate property and she entitled to recover for them." To which part of the charge the defendant's counsel excepted. The defendant's counsel requested the court to charge the jury, "that as to the cows, if the note given for them by Pat-

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trick Garrity and Ryan had not been paid at the time of the levy, then the title to the cows was not in the plaintiff, there being no evidence that she had ever promised to pay the note." Which request was refused, and the defendant's counsel excepted.

The charge respecting the cows was correct; and the request to charge, touching the title to them, was properly refused. (*See Lounsbury v. Purdy*, 18 N. Y. Rep. 515.) If A. employs B. as his agent to purchase goods for him, and B. purchases goods for A., the latter acquires the title to the goods by the purchase, although B. gives his own note for the same. In this case Ryan and the husband of the plaintiff acted as agents of the plaintiff, and for her, in purchasing the cows; and the plaintiff was the owner of the cows, although her husband and Ryan gave their note for the purchase price. She subsequently paid the note.

If there be any doubt as to the right of the plaintiff to maintain the action for the levy upon the cows and hay, yet if there was no fraud in the case, or intention to defraud the creditors of the plaintiff's husband, (and the jury have found there was no fraud or such intention to defraud,) the right of the plaintiff to recover for the subsequent sale of the cows and hay is clear. She then was entitled to the possession of the cows and hay, and had the legal as well as the equitable title thereto, as against her husband.

The defendant was informed that the plaintiff claimed the property, and he was forbidden by her to sell the same.

It is not pretended that the judge did not correctly submit to the jury the questions of fraud in the case. The jury have found from the evidence, as I think they were justified in finding, that the plaintiff paid for the farm and cows, and that her husband never paid any thing towards either the farm or cows; that it was by mistake that the farm was conveyed by Perry to the husband of the plaintiff,

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when it should have been conveyed to the latter; and that all the transactions between the plaintiff and her husband were in good faith, and without any intent on the part of either to hinder, delay or defraud the creditors of the husband. It is therefore equitable and just that the plaintiff should have the benefit of her recovery in the action.

If the views I have expressed upon the legal questions in the case are correct, they dispose of all other propositions depending upon them, against the defendant, and his motion for a new trial should be denied, with costs.

So decided.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, Boardman, Murray and Parker, Justices.*]

RICHARDSON and another vs. MASON & CORSON.

58b	601
76 AD	285
76 AD	285

During a negotiation between the plaintiffs and defendants, for the purchase of a number of cows by the former, of the latter, one of the plaintiffs told one of the defendants that he wanted to know if the cows were all right—all perfect—and when they were coming in; that the plaintiffs wanted them to take back into the country to sell to dairymen, to fill in where their cows were farrow and old, &c.; that they must know whether they were all coming in in good season, as they had to warrant them coming in, and wanted them perfect every way, &c. The defendant said they were all coming in in good season but one, &c. *Held*, that the jury had a right to find, from this evidence, that the defendants warranted the cows to be with calf, except one, at the time of the sale, and that the times when they became with calf were of such dates that they would come in in good season the following spring, for dairy cows. That it was not necessary for the defendants to say they warranted the cows, to make them liable for a warranty on them.

Held, also, that the assertion of the defendant that the cows "were all coming in in good season in the spring, but one," being positive and unequivocal, the plaintiffs had the right to rely on it as the absolute assertion of a fact, and not the mere expression of an opinion.

The authorities are numerous that such an assertion may be held by a jury to constitute a warranty.

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Held, further, that the objection that the action was commenced before the time arrived at which the defendants warranted the cows would have calves, even if it had been raised at the trial, would have been unavailable to the defendants; for the reason that if the cows were not with calf at the time of the sale, the warranty was broken at the time the action was commenced. And that the time when the cows were to come in, according to the warranty, having passed at the time of the trial, there was no difficulty then in establishing the alleged breach of the warranty.

The plaintiffs having, after their purchase of the cows, sold some of them to a third person, the latter, on being cross-examined as a witness, stated that the plaintiffs warranted the cows to him for four weeks. He was then asked, "Are we to understand by the warranty made to you by the plaintiffs on the sale of these cows, that if they appeared to be with calf, by not being a bulling within four weeks, that was to be an end of the warranty?" The question was objected to on the ground that the witness had stated what the warranty was, and that he should give the facts, and not his opinion. The objection was sustained. *Held*, that the ruling was correct, for the reasons stated in the objection, and also for the reason that the evidence sought for was immaterial to the issue.

The judge denied the request of the defendants' counsel, to charge the jury that so far as it appeared to them that any of the cows were sold by the plaintiffs to third persons, warranted only for four weeks, or any other limited time, and there was no breach of warranty within that time, the plaintiffs could not recover for them in this action, though such cows ultimately did not come in. *Held*, that the request was properly refused.

Held, also, that the plaintiffs were entitled to recover the difference between the value of the cows, if they had been in the condition the defendants warranted they were, and their value in the condition they in fact were at the time the plaintiffs purchased them.

THIS action was brought before a justice of the peace in the county of Madison, where the plaintiffs complained that on or about September 3d, 1866, they bought of the defendants a certain number of cows, which the defendants represented and warranted to be with calf and to calve in good season, and in consequence of such representations and warranty the plaintiffs were induced to buy, and did buy said cows, and paid therefor the sum of \$1685, whereas said cows, or a number of them, were not with calf, as represented and warranted, whereby the plaintiff suffered damage to the amount of two hundred

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dollars. The defendants denied the allegations in the complaint.

The plaintiffs recovered a judgment before the justice; from which the defendants appealed to the county court, of Madison county.

The action was retried in the county court in June, 1867, where the plaintiffs recovered a verdict for \$127.50 damages.

The defendants took exceptions on the trial, and after judgment was rendered against them by the county court, they appealed from the judgment of that court to this court. The case was argued in this court by —

Thos. Barlow, for the defendants.

S. T. Holmes, for the plaintiffs.

By the Court, BALCOM, P. J. The defendants raised the question in the county court that the evidence did not establish a warranty of the cows by them. The court refused to hold that no warranty was proved, and the defendants excepted. The court submitted the question to the jury whether the evidence established a warranty, and the defendants excepted.

The cows were purchased by the plaintiffs in the fall of the year 1866, on the defendants' farm, in the county of Madison. The number was thirty-seven. The defendants had a larger number of cows. The plaintiff Fletcher testified as follows: "I called Corson one side and told him I wanted to know if the cows were all right, all perfect, and when they were coming in; that we wanted them to take back into the country to sell to dairymen to fill in where there their cows were farrow and old, that they wanted to turn off; and we must know whether they were all coming in in good season, for we have to warrant them coming in, and we want them perfect every way —

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their teats and bags perfect; he said, *they are all coming in in good season but one*; he said there was one two-teater, and there was one that had been to bull two or three times; we finally concluded to buy thirty-seven, and did, for \$50 a head for the lot."

The plaintiff Richardson testified that the defendant Corson said, at the time the plaintiffs purchased the cows, "they were all coming in in good season in the spring, but one, and that one had been to bull over two or three times."

The jury had the right to find, from this evidence, that the defendants warranted the cows were with calf, except one, at the time they sold them to the plaintiffs, and that the times they became with calf were of such dates they would come in in good season the following spring, for dairy cows. It was not necessary for the defendants to say they warranted the cows, to make them liable for a warranty on them. Corson's assertion that the cows "were all coming in in good season in the spring, but one," was positive and unequivocal. The plaintiffs had the right to rely on it as the absolute assertion of a fact, and not the mere expression of an opinion.

The authorities are numerous that such an assertion may be held by a jury to constitute a warranty. It was held in *Whitney v. Sutton*, (10 Wend. 411,) that in an action for a breach of warranty in the exchange of horses, to support the allegation of a warranty, it is not necessary that the word warrant should have been used; and whether what was said amounted to a representation of soundness, or to a mere expression of an opinion, belongs to the jury to determine. It was determined in *Cook v. Moseley*, (13 Wend. 277,) that an affirmation that a horse is not lame, accompanied by the declaration of the owner that he would not be afraid to warrant him, is enough to establish a warranty.

The decision in *Rogers v. Ackerman*, (22 Barb. 134,)

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shows that the rulings of the county court in this case were correct on the question of warranty. The rule on the subject is clearly illustrated in *Cowen's Treatise, second edition, vol. 1, page 313.*

The warranty was in the present tense, viz., that the cows, except one, were with calf, and became so at times proper for them to come in in good season the following spring.

A breach of the warranty was clearly proved; also the amount of damages the plaintiffs recovered.

The question now presented, that the action was commenced before the time arrived at which the defendants warranted the cows would have calves, was not raised at the trial. But if it had been raised there, it would have been unavailable to the defendants; for the reason, that if the cows were not with calf when the plaintiffs purchased them, the warranty was broken at the time the action was commenced. The time the cows were to have calves, according to the warranty, had passed, at the time of the trial in the county court, so there was no difficulty then in clearly establishing the alleged breach of the warranty.

The plaintiffs sold some of the cows to one Purdy, who testified as a witness for them. On his cross-examination by the defendants' counsel, he stated that the plaintiffs warranted the cows to him for four weeks. The defendants' counsel then put this question to Purdy, viz: "Are we to understand by the warranty made to you by the plaintiffs on the sale of these cows, that if they appeared to be with calf by not being a bulling within four weeks, that was to be an end of the warranty?" To this question the plaintiffs' counsel objected, on the ground that the witness had stated what the warranty was, and that the witness should give the facts and not his opinion, and the testimony was incompetent. The court sustained the objection, and the defendants' counsel excepted. This ruling was correct, for the reasons stated in the objection

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to the question. And it was also correct, for the reason that the evidence sought by the question was immaterial to the issue in the case.

The defendants' counsel requested the court to charge the jury, that so far as it appears to the jury that any of these cows in controversy were sold by the plaintiffs to third persons, warranted only for four weeks or any other limited time, and there was no breach of warranty within that time, the plaintiffs could not recover for them in this action though such cows ultimately did not come in. But the court refused so to charge, and the defendants' counsel excepted.

This request was properly refused. If the plaintiffs had sold all the cows immediately after they purchased them, and had made precisely such a warranty respecting their being with calf and coming in, as the defendants made when they sold them to the plaintiffs, and the purchasers from the plaintiffs had released the plaintiffs from all liability on their warranty, such facts would not have affected the defendants' liability on their warranty to the plaintiffs. The plaintiffs were entitled to recover the difference between the value of the cows, if they had been in the condition the defendants warranted they were, and their value in the condition they in fact were, at the time the plaintiffs purchased them. If the court had adopted the defendants' request they would have avoided paying damages in part for a breach of their warranty, because the plaintiffs had not been held liable for warranting the cows to be with calf when they sold them. For any thing that the case shows, the plaintiffs might have sold the cows for a less price on a warranty that it would not appear they were not with calf "for four weeks," than they would if they had warranted them in the manner and to the extent the defendants warranted them to the plaintiffs.

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It is clear the plaintiffs were entitled to the full benefit of the defendants' contract of warranty of the cows.

The defendants offered to prove that one Mosely was interested in the cows, or cause of action, at the time the action was commenced. This offer was properly rejected, on the ground that such a defense was not set up in the answer.

The foregoing views dispose of all the questions in the case raised by the defendants' counsel in this court.

It follows that no error was committed on the trial in the county court, and that the judgment of that court should be affirmed, with costs.

So decided.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, Boardman, Parker and Murray, Justices.*]

VEDER COLE vs. WELCOME COLE, executor of &c. of William Cole, deceased, and others.

A testator, by the 2d and 3d clauses of his will, devised as follows: "Second. I give, devise and bequeath unto my son Veder, all my certain farm on which I now reside, situate, &c., and all my farming utensils and household furniture, &c., to have and to hold the same unto him, his heirs and assigns forever, subject, however, to the payment by my son Veder, of the sum of \$200 to each of the following named persons, viz., to my sons Welcome, William and Calvin, and to the widow of my son Alpheus; the aforesaid legacies to be paid by my said son Veder, the one half part in one year, the other half part in two years, from the time of my decease. Thirdly. All the rest and residue of my *personal estate* that shall be and remain after the payment of my just debts and funeral expenses, and the legacies to my grandchildren, I give and bequeath unto my sons Welcome, William and Calvin, and to the widow of my son Alpheus, equally, to be divided between them, share and share alike; and what receipts I may have at the time of my decease, against my said sons and grandsons, to be charged them severally. And also what receipts I hold against my deceased son, Alpheus, to be charged to his widow as payment towards her legacy, and no charge for interest is to be made on any of said receipts, in the settlement of my estate."

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The testator owed no debts at the time of his decease. He had no real estate, except the farm devised to his son Veder. He left about \$800 of personal property, besides his household furniture and farming utensils. The testator began to advance money to his children in 1827, and continued to advance until 1860, taking receipts which stated that the child signing them received the money *towards his portion of the estate of the testator*. The receipts signed by Welcome and William showed that each had received prior to the date of the will \$508.50, and \$140 in June, 1860, after the date of the will. Those signed by Calvin showed that he had received \$800 before the date of the will, and \$200 in April, 1859. Those signed by Alpheus were dated prior to the will, and showed that he had received \$500, and \$140 was paid to his widow, in June, 1860. No advancements were made to Veder, but the farm devised to him was worth over \$5000.

Held, 1. That if the will clearly indicated that the personal estate of the testator was to be exonerated from the payment of the \$200 each, charged upon the farm devised to Veder, it was the duty of the court not to disappoint that intent of the testator; and that such was the intention was too clear for argument.

2. That the language of the will being that the receipts which the testator held against Alpheus should be charged to his widow "as payment towards her legacy," when two legacies were given to her, the fair import of the language used was that such receipts should be a payment towards the legacy mentioned in the third clause of the will, and not a payment towards the two legacies given to the legatee.
3. That the intention of the testator was, that in the division of the residuary portion of his personal estate into four legacies, the money advances he had made to his four sons previous to the date of his will, and the sums he should thereafter advance to the three survivors, as should appear from their receipts, should be charged to those three and the widow of the deceased son, severally, so that each of said sons living would receive an equal share of his personal estate; and that the advances to Alpheus, and what his widow would receive, would be just equal to the advances made to each of said living sons with what each of such sons would receive on said division. That in that case they would share alike, though one received more than another before the death of the testator, and would receive less than another thereafter.
4. That the only object the testator had in requiring that the advances he made to his sons should be charged to them and to the widow of Alpheus, was that the division of the residuary portion of his personal estate would be so made that they would share alike in his estate, taking into consideration what they had received, as well as what they would receive therefrom.
5. That a construction of the will that would make the advances of the testator, or the receipts he had, satisfy the four \$200 legacies that Veder was required to pay, would render unnecessary and useless that portion of the will which gave those legacies and required Veder to pay them.

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Veder was accordingly ordered to pay the four legacies of \$200 each, to the persons named in the second clause of the will; and such legacies, with interest thereon from the time they should have been paid, were adjudged to be a charge upon the farm devised to him.

THIS action was brought to obtain a judicial construction of the last will and testament of William Cole, late of Richfield, Otsego county, deceased. It was referred to a referee to hear and determine. Upon his decision a judgment was entered, in the office of the clerk of Otsego county, in February, 1868. From which judgment the defendants, Welcome Cole, executor, William Cole and Ada Cole, appealed to the general term of this court. The other defendants did not defend the action.

J. S. Davenport and E. M. Card, for the plaintiff.

Sedgwick, Andrews & Kennedy, for the defendants.

By the Court, BALCOM, P. J. The deceased, William Cole, executed the will in question on the 4th day of July, 1857. He died on the 17th day of February, 1863. The will was proved before the surrogate of Otsego county and admitted to probate by him; and the defendant Welcome Cole qualified as executor of the will before this action was brought.

The questions in the case arise on the following clauses of the will, viz: "Second. I give, devise and bequeath unto my son Veder Cole, all my certain farm on which I now reside, situate in the town of Richfield, and all my farming utensils and household furniture of which I may die possessed, to have and to hold unto him, his heirs and assigns forever; *subject, however, to the payment by my son Veder, of the sum of two hundred dollars to each of the following named persons, viz: to my sons Welcome, William and Calvin Cole, and to the widow of my son Alpheus; the aforesaid legacies to be paid by my said son Veder, the one half part in one year, the other*

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half part in two years from the time of my decease. Thirdly. All the rest and residue of my *personal estate* that shall be and remain after the payment of my just debts and funeral expenses, and the legacies to my grandchildren, I give and bequeath unto my sons Welcome, William and Calvin, and to the widow of my son Alpheus, equally, to be divided between them, share and share alike; and what receipts I may have at the time of my decease, against my said sons and grandsons, to be charged them severally. And also, what receipts I hold against my deceased son, Alpheus, to be charged to his widow as payment towards her legacy; and no charge for interest is to be made on any of said receipts, in the settlement of my estate."

The testator did not owe any debts at the time of his death. He had no real estate except the farm devised to his son Veder Cole. He left about \$800 of personal estate, besides his household furniture and farming utensils. He began to advance money to his children as early as 1827, and continued to do so until in the year 1860. He took receipts therefor, which he had at the time of his decease, that stated the child signing them received the money therein mentioned of him *towards his portion of the estate of the testator.*

The receipts signed by Welcome Cole showed that he received, prior to the date of the will, \$503.50; and that he received \$140, June 22, 1860, which was subsequent to the date of the will. Those signed by William Cole showed he received \$503.50 before the date of the will, and that he afterwards received \$140, June 22, 1860. Those signed by Calvin Cole showed he received \$300 before the date of the will, and that he afterwards received \$200, April 27, 1859. Those signed by Alpheus Cole, deceased, were dated in 1839 and 1853, and showed he received \$500. A receipt signed by Ada Cole, widow of Alpheus, showed she received \$140, June 22, 1860.

The testator left receipts signed by his grandchildren,

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to whom he gave specific legacies in his will, dated subsequent to the date of the will, showing he had advanced to each of them the precise amount of his legacy. Those legacies were not made a charge upon the real estate of the testator, and no question is now raised but that they were satisfied by the advancements shown by the receipts signed by the grandchildren to whom such legacies were given.

It does not appear that any advances were made by the testator to Veder Cole for which receipts were given; but the farm devised to him was worth over \$5000.

The particular legacies of \$200 each to Welcome, William and Calvin Cole, and to the widow of Alpheus Cole, deceased, were to be paid by Veder Cole, and he took the farm devised to him, *subject* to the payment thereof. In no contingency were such legacies to be paid out of the personal estate of the testator. They could not be paid out of his personal estate. His household furniture and farming utensils were worth about \$50, and the same were specifically bequeathed to Veder Cole; and all the residue of his personal estate, except two legacies of \$50 each to two of his grandchildren, was given to the same legatees, share and share alike, to whom said legacies of \$200 each were bequeathed. He had no real estate except the farm devised to Veder Cole. The four legacies of \$200 each were made a charge upon that farm, and they were to be paid by Veder Cole, and not by the executors named in the will, or by any other person.

Veder Cole took the farm on condition that he pays the four legacies charged thereon, and "upon the *further* express condition" that he makes no charge against the estate of the testator for any labor or services he performed for him, as the testator declared he considered what he gave him by his will was an ample remuneration for all such services, over and above what would be his, Veder's, share of the testator's estate.

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The four legacies of \$200 each are not bequeathed to the four persons to whom they are to be paid, except inferentially. But the legacies mentioned in the third clause of the will (which clause is the residuary part of the will) are expressly given unto such four persons, by the testator.

There can be no doubt, if the will clearly indicates that the personal estate of the testator was to be exonerated from the payment of the four legacies of \$200 each, charged upon the farm devised to Veder Cole, it is the duty of the court not to disappoint that intent of the testator. That such was the intention of the testator is not a debatable question. It is too clear for argument.

What did the testator mean by declaring that what receipts he might have at the time of his decease, against his said sons and grandsons, should be charged to them severally; and also that what receipts he held against his deceased son, Alpheus, should be charged to his widow as payment towards her legacy? Those declarations follow the bequests in the third clause of the will, which in no way relate to the four legacies that are charged upon the farm devised to Veder Cole in the second clause of the will. At the time the will was executed, the advances made by the testator to his three sons, and the widow of the fourth son, were unequal, and they were unequal at the time of his death.

Two legacies were given to the said widow of the deceased son, Alpheus; but the language of the will is, that the receipts which the testator held against Alpheus should be charged to his widow "as payment towards her legacy." The fair import of this language is, that such receipts should be a payment towards the legacy mentioned in the third clause of the will, and not a payment towards the two legacies given to such widow.

In my judgment, the intention of the testator was, that in the division of the residuary portion of his personal estate into four legacies, the money advances he

made to his sons Welcome, William, Calvin and Alpheus, previous to the date of his will, and the sums he should thereafter advance to said Welcome, William and Calvin, as should appear from their receipts, should be charged to said Welcome, William, Calvin and the widow of Alpheus, severally, so that each of said sons living would receive an equal share of his personal estate, and that the advances to Alpheus, and what his widow would receive, would be just equal to the advances made to each of said living sons, with what each of such sons would receive on said division. In that case they would share alike, though one received more than another before the death of the testator, and would receive less than another thereafter.

To illustrate: Welcome and William each received \$643.50 from the testator before he died. But Calvin received only \$500. Of course Calvin must receive more out of the estate since the death of the testator than either Welcome or William, to share alike with the two latter in the whole estate from the time advances were first made to either of them.

It seems to me the only object the testator had in requiring that the advances he made to his sons should be charged to them and to the widow of Alpheus, was that the division of the residuary portion of his personal estate would be so made that they would share alike in his estate, taking into consideration what they had received as well as what they would receive therefrom.

At the date of the will the testator had advanced to each of his sons, Welcome, William, Calvin and Alpheus, over two hundred dollars.— The will required Veder to pay to Welcome \$200, William \$200, and Calvin \$200, and to the widow of Alpheus \$200, on condition that Veder should take the farm devised to him. Why should the testator require Veder to pay said four legacies of \$200 each, if he intended the advances he had made to the leg-

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atees should operate to discharge such legacies? A construction of the will that would make the advances of the testator, or the receipts he had, satisfy the four \$200 legacies that Veder was required to pay, would render that portion of the will unnecessary and useless which gives those legacies and requires Veder to pay them. But the construction which shows the advances of the testator should only be considered in dividing the residuary portion of the personal estate of the testator, mentioned in the third clause of the will, makes every part of the will necessary. It gives effect to the entire will, and harmonizes all its part with the facts on which the testator acted in making it.

It is not disputed but that the \$140 advanced by the testator to the widow of Alpheus on the 22d day of June, 1860, (which was after he made his will,) must be charged to her in making the division pursuant to the third clause of the will. That money, with the advances made to her husband, makes the sum of \$540, which must be charged to her in making such division.

According to the foregoing views, Veder Cole must pay the four legacies of \$200 each to the persons named in the second clause of the will; and such legacies, with interest thereon from the time they should have been paid, are a charge upon the farm devised to him, and should be so adjudged in this action.

If the foregoing conclusions are correct, the decision of the referee was erroneous, and the judgment entered thereon should be reversed, and a new judgment entered, in conformity with such conclusions.

So decided, and the plaintiff adjudged to pay costs.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, Boardman and Parker, Justices.*]

THE FIRST NATIONAL BANK OF CANANDAIGUA vs. MARTHA A.
GARLINGHOUSE.

The necessary effect and intent of the act of 1862, authorizing married women to sue and be sued in courts of law, "in the same manner as if they were sole," is to remove all the disabilities of coverture, so far as to enable a married woman to hold separate property and to carry on trade and business, and make all the ordinary and incidental contracts relating thereto, and to be sued in respect to such contracts, in all respects as though she were in fact unmarried.

Hence she may confess a judgment to secure a debt contracted by her, and for her use and benefit, in carrying on her separate business. JOHNSON, J., dissented.

THE defendant, who was a married woman, confessed a judgment in favor of the plaintiff, as if she were a *feme sole*. The judgment being entered in due form, she moved, at a special term, to set it aside. The court set aside the judgment, on the ground that a married woman could not confess a valid judgment; and the plaintiff appealed to the general term.

E. G. Lapham, for the appellant.

Geo. F. Danforth, for the respondent.

E. DARWIN SMITH, J. The order at special term, setting aside the judgment in this action, was made and based, as appears from the opinion of the learned judge then delivered, upon the express ground that a married woman could not confess a judgment. This was undoubtedly so, at common law. (*Brittin v. Wilder*, 6 Hill, 242. 3 T. R. 151. *Watkins v. Abrahams*, 24 N. Y. Rep. 72.) The reason for this rule at common law is quite apparent. A married woman was under disability, like an infant. She could not confess a judgment, because she could not appoint an attorney. She could not sue or be sued alone, at law. She could not make a valid personal contract. She

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had no separate legal estate. No judgment could be given against her *in personam*.

These disabilities doubtless remain, except so far as they have been removed by modern legislation.

The acts of 1848 and 1849 took away the rights of the husband in respect to the wife's personal property, converted her separate equitable estate into a legal estate, and allowed her to take property by inheritance, gift, grant, devise or bequest from any person other than her husband, and to receive the rents and issues of her separate property, and to sell, devise and convey such property in the same manner and with like effect as if she were unmarried, and exempted such property and its proceeds from all liabilities for the debts of the husband. In no other respects did these acts take away the common law disabilities of coverture. The property of married women, after the passage of these acts, remained in her hands, subject to the control of the courts, in equity, and the courts of equity alone, precisely as the same stood before their enactment. But the act of 1860 goes much further. Section two of that act authorizes a married woman to bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or service, on her sole and separate account; and declares that the earnings of any married woman from her trade, business, labor or service, shall be her sole and separate property, and may be used and invested in her own name.

As under this act, any married woman may engage in and carry on any kind of business, in the same manner as if she were unmarried, or as any man can do, she is thereby necessarily relieved of her disability as a married woman, so far that she may make any valid contract for the sale or purchase of property, and in the borrowing or loaning or investing money for her separate use or benefit, as much as if she were a single woman. Her contracts in respect to her separate property or trade and business, are

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valid and legal contracts, as much so as if made by her husband on his own account.

To give her the full benefit of these provisions, in respect to her separate estate and to the carrying on of any trade or business, section 7 of said act, as amended in 1862, further provides that "any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase or the gift or grant of any person, in the same manner as if she were sole." While, as Judge Porter says, in *Owen v. Cawley*, (36 N. Y. Rep. 603,) the antecedent disabilities of a married woman, arising from the conjugal relation, were not wholly removed, they were necessarily so far modified as to secure to her the beneficial enjoyment of the new interest she was permitted by law to acquire. The cases of *Yale v. Dederer*, (22 N. Y. Rep. 450;) *Ballin v. Dillaye*, (37 *id.* 35,) and others, hold that she may contract debts now, in respect to her legal or separate estate, precisely as she could have done for the benefit of the estate before those acts, and that such debts are valid legal debts, and the estate is legally liable for such debts.

Upon the face of the confession of judgment in this action it appears, and the fact is verified by the oath of the defendant, that said judgment was confessed for the following cause of action: "That on the 13th day of January, A. D. 1868, I, the said Martha A. Garlinghouse, executed and delivered to the said First National Bank of Canandaigua a promissory note dated on that day, for the sum of seven thousand five hundred dollars, payable sixty days after date, at said bank. Such note was given by me for that amount of money loaned to me that day by the said bank, and is now wholly due and unpaid." The judgment was confessed on the 16th of March, when this note fell due, and there is annexed to it a stipulation, signed by the plaintiff, giving time for the payment of said

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debt, and also for the further loan of \$1000 for the purpose of purchasing new stock in her trade and business, and for no other purpose. It also clearly appears from the affidavits used on this motion that the defendant, at the time of the confession of said judgment, and for several years immediately previous thereto, was engaged in carrying on a separate business, in her own name, at the village of Canandaigua, of manufacturing and selling spirituous liquors. That she had done a large amount of such trade and business, and kept a bank account with the plaintiffs' bank, and that the said money was there placed to her account, in said bank, and the same was drawn out by her and used and employed by her in carrying on her said separate business; that she had a separate legal real estate; and that said judgment was confessed, to give the plaintiffs a lien thereon for the money so loaned to her.

It thus clearly appears that this judgment was confessed to secure a loan of money made to the defendant to enable her to carry on her separate trade and business, and to get time for the payment of such loan and further advances; and this makes the debt one for which, within the express letter of section 7 of the act of 1860, as amended in 1862, the defendant could clearly be sued, *in the same manner as if she were sole*. If she were a sole woman she could unquestionably confess a judgment for debt, as well as a man, and it would be a valid judgment, at law.

But under the act of 1862, whatever may have been the construction of the acts of 1848, 1849 and 1860, a judgment *in personam* may now be rendered against a married woman, in such case and for such cause. Section 7 of the act of 1862, is as follows: "A married woman may be sued in any of the courts of this state, and when judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were *feme*

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sole." This makes her separate property subject to execution at law, the same as if she were sole, for she may be sued in law courts having no equity jurisdiction, which clearly could not have been done prior to the acts of 1860 and 1862. (*Barton v. Beer*, 35 Barb. 78. *Morrell v. Cawley*, 17 Abb. 76. *Klen v. Gibney*, 24 How. 31.)

It seems to me, therefore, that the necessary effect and intent of the act of 1862, following and amending the acts of 1849 and 1860, is to remove all the disabilities of coverture, so far as to enable a married woman to hold separate property and to carry on trade or business, and make all the ordinary and incidental contracts relating thereto, and to be sued in respect to such contracts, in all respects as though she were unmarried. I cannot see, therefore, why she may not give a security for a debt contracted for her use and benefit, by a judgment confessed, as well as by a judgment obtained *in invitum*; as much so as if she were a man or a sole woman.

The confession of a judgment is but one of the ways and processes—one "manner"—by which a person is sued. It is a voluntary submission to the jurisdiction of the court, giving by consent and without the service of process, what could otherwise be obtained by summons and complaint, and other formal proceedings. A person who confesses a judgment submits to be sued in that form and manner. The right to sue and be sued implies the right to use and employ, and to be subjected to, all the processes by which the judgments of courts are obtained.

I can see, therefore, no reason why a narrower construction of these acts, and the rights conferred by them, should be adopted. A married woman, in respect to her separate property, is placed by these acts upon the same plane with her husband, or any other man. It was clearly the intention of the legislature, I think, to liberalize the law in respect to her, and give her all the rights, and subject her to all the liabilities, of single women, in respect

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to her separate property and any trade or business in which she might engage. The right to confess a judgment is one of these rights. It may be quite essential to her interest to be able to give such a security to a creditor, as it obviously was in this case. When she is expressly authorized "*to sue and be sued in the same manner as if she were feme sole,*" she is impliedly authorized to use the requisite and ordinary agencies of suing and being sued; that is, to appoint an attorney for that purpose; and when, superadded to this removed disability, she is authorized also to contract debts in her own name, for her separate use and benefit, and is subjected to a judgment *in personam*, all the reason which existed at common law why she might not confess a judgment in those cases where she might be sued, is removed, and she stands, in that particular, on the same ground as if she were unmarried in fact.

But if this were doubtful, I think it quite clear that this court is not bound to set aside such a judgment. The courts of England, at common law, refused to set aside a judgment confessed by a married woman when she lived by herself and acted as a *feme sole*. (1 *Salk*. 400. *Graham*, 772.) And this court has held, in a well considered case, (*Knickerbocker v. Smith*, 16 *Abb.* 241,) a case where the judgment was entered up in 1858, that the court was not bound to set aside a general judgment against a married woman, upon her mere motion for that purpose.

I think the order setting aside the judgment in this case should therefore be reversed.

JAMES C. SMITH, J., concurred.

JOHNSON, J., dissented.

Order reversed.

[MONTGOMERY GENERAL TERM, December 7, 1868. *E. Darwin Smith, Johnson and James C. Smith*, Justices.]

MARY ATWATER vs. JOHN G. ATWATER.

The Supreme Court has no authority to decree a separation between husband and wife, or to make an order for the support and maintenance of the wife by her husband, except that specially conferred by the statute. (2 R. S. 5th ed. p. 237, § 55.) And the statute does not authorize a bill or complaint to be filed by a wife for a support and maintenance by her husband, as a distinct substantive relief.

That relief can only be granted when a separation is asked; and the statute, in terms, states three causes only for which such separation may be adjudged, viz: 1. The cruel and inhuman treatment by the husband of his wife; 2. Such conduct on the part of the husband, towards his wife, as may render it unsafe and improper for her to cohabit with him; 3. The abandonment of the wife by the husband, and his refusal or neglect to provide for her.

Where the plaintiff, in her complaint, alleges facts bringing her case within each of these three causes, but the referee finds that she has entirely failed to establish the first and second, and as to the third he finds that there has been no abandonment of the plaintiff, by the defendant, but that he has refused and neglected to provide for her, the plaintiff is not entitled to a judgment for a separation; abandonment and refusal or neglect, being both necessary to justify such a judgment.

APPPEAL by the defendant from a judgment entered upon the report of a referee. The action was brought by the plaintiff to obtain a limited divorce. The amended complaint alleged acts of the defendant amounting to cruel and inhuman treatment of the plaintiff; also such acts as rendered it unsafe and improper for her to cohabit with him; also abandonment and refusal to support the plaintiff, as the three grounds for such a judgment.

The answer denied the acts alleged, and set up as a defense misconduct on the part of the plaintiff.

The issues were referred to, and tried before, a referee, who made his report, by which he found every issue of fact made by the pleadings, and upon which the statute authorizes a decree for a limited divorce, (*see* 3 R. S. 237, 5th ed.,) in favor of the defendant, and by which he found, as a conclusion of law, that the plaintiff was not entitled to the judgment prayed for.

The referee also found as facts, that the age of the

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plaintiff was sixty-seven years, and the age of the defendant fifty-eight; that at the time of the commencement of this action, the defendant was the owner of property of the value of \$20,000 and upwards; that about the year 1858 the plaintiff and defendant ceased to cohabit together, although they resided or boarded in the same house for several years thereafter; that they entertain bitter and hostile feelings towards each other, and their residing in the same house would be cause of unhappiness to both; that the defendant has refused and neglected to provide for the plaintiff.

The referee found, as one of his conclusions of law, "that this is a suitable and proper case for the support and maintenance of the plaintiff, by the defendant;" and thereupon directed "judgment to be entered that the defendant be ordered to pay the plaintiff fifty dollars per month for the support and maintenance of the plaintiff, to commence with the time of the commencement of this action, less any amount which the defendant has paid the plaintiff for alimony, pursuant to any order of the court, and that the defendant pay to the plaintiff her costs and disbursements in this action."

On the 12th of November, 1868, the plaintiff entered a judgment, by which it was ordered that the plaintiff recover of the defendant \$1760, (being the amount of the \$50 per month, from the commencement of the action to October 29, 1868, less alimony paid during the progress of the action,) and her costs, amounting, in all, to \$2212.66; also that the defendant pay the plaintiff \$50 per month, monthly, from October 29, 1868, until the further order of the court.

Britton & Ely, for the appellant.

E. L. Sanderson, for the respondent.

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By the Court, Lorr, P. J. The Revised Statutes provide that a separation from bed and board forever, or for a limited time, may be decreed on the complaint of a married woman, subject to certain qualifications not necessary to be here stated, for the following causes:

1st. The cruel and inhuman treatment by the husband, of his wife.

2d. Such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him.

3d. The abandonment of the wife by the husband, and his refusal or neglect to provide for her. (2 *R. S.* 146, *fc.*, §§ 50, 51.)

The complaint "shall specify particularly the nature and circumstances of the complaint on which she relies, and shall set forth times and places with reasonable certainty;" and "the defendant may be permitted to prove, in his justification, the ill conduct of the complainant, and on establishing such defense to the satisfaction of the court, the bill (complaint) shall be dismissed."

It is then, after providing that "upon decreeing a separation, the court may make such further decree as the nature and circumstances of the case may require, and may make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as may appear just and proper," (§ 54,) further provided, that "although a decree for separation from bed and board be not made, the court may make such order or decree for the support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as the nature of the case renders suitable and proper." (§ 55.)

The complaint in this case sets forth facts and circumstances showing the plaintiff's right to a judgment for separation on each of the three grounds or causes above specified, and the defendant, by his answer, in addition to

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the denial or explanation of the material facts stated by the plaintiff, sets up in justification of his acts, ill conduct on her part.

The issues raised by the pleadings were referred to a referee to hear and determine, and he, by his decision, has found: 1st. That there has been no cruel or inhuman treatment by the defendant, of the plaintiff, as charged in the complaint. 2d. That there has not been such conduct on the part of the defendant towards the plaintiff, as may render it unsafe or improper for her to cohabit with him. 3d. That the defendant has not abandoned the plaintiff, as charged in the complaint. 4th. That the defendant has refused and neglected to provide for the plaintiff, as charged in the complaint. 5th. That the plaintiff has not been guilty of ill conduct, as charged in the answer. He then, after stating the ages of the parties, and the value of the property owned by the defendant at the time of the commencement of this action, to have been twenty thousand dollars, and upwards, finds in addition, "that from about the year 1858, the plaintiff and defendant ceased to cohabit with each other, although they resided or boarded in the same house for several years thereafter; that they both [each] entertain towards the other bitter and hostile feelings, and their residing in the same house would be the cause of unhappiness on the part of both."

Upon these facts so found by him, he finds and decides as conclusions of law: 1st. That the plaintiff is not entitled to a judgment or decree for separation from bed and board from the defendant. 2d. That this is a suitable case for a judgment or decree for the support and maintenance of the plaintiff by the defendant. 3d. That judgment be entered ordering the defendant to pay the plaintiff fifty dollars a month for such support and maintenance, until the further order of this court, to commence with the time of the commencement of this action, after deducting the moneys paid by him as alimony under former orders of

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the court. 4th. That the defendant pay to the plaintiff her costs and disbursements in this action.

Thereupon judgment was entered, ordering the payment by the defendant, to the plaintiff, of the sums directed to be paid by that decision for her support and maintenance, and for her costs and disbursements in this action.

The defendant has excepted to so much of the findings of the referee as finds, that "this is a suitable and proper case for a judgment or decree for the support and maintenance of the plaintiff by the defendant;" and also to his conclusion and direction that judgment be entered ordering payments to be made by him for the plaintiff's support and maintenance, and her costs and disbursements in the action, in accordance with the said decision.

The exceptions present the question, whether it was competent for the referee or the court, under section 55, above quoted, to make an order or judgment for the support and maintenance of the plaintiff by her husband, when she failed to establish either of the grounds or causes required by the statute to authorize a judgment for separation from bed and board; and after a careful examination and consideration of the matter, I have come to the conclusion that it is not.

This court has no authority to decree such a separation, or to direct such support and maintenance, except that specifically conferred by the provisions of the law above set forth. They do not authorize a bill or complaint to be filed by a wife for a support and maintenance by her husband, as a distinct substantive relief. That relief can only be granted when a separation is asked, and the statute in terms states three causes only for which such separation may be adjudged, and makes it necessary for the plaintiff, in her complaint, to specify particularly the nature and circumstances on which she relies to establish the cause or causes on which her claim is founded.

In this case the plaintiff has alleged facts bringing her

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case within each of these three causes, and the referee has found that she has entirely failed to establish the first and second, and as to the third, he finds that there has been no abandonment of the plaintiff by the defendant, but that he had refused and neglected to provide for her. Such abandonment and refusal or neglect are both necessary to justify a judgment for a separation, and it was properly decided that the plaintiff was not entitled to such relief.

Assuming that conclusion to be correct, it appears to me that if such facts and circumstances only had been alleged in the complaint as show a refusal or neglect by the defendant to provide for the plaintiff, but not sufficient to establish an abandonment, they would not have constituted a cause of action, and the complaint would have been dismissed on demurrer thereto, upon that ground.

The effect of the referee's decision is, however, to give the plaintiff relief, after a trial upon such facts alone. A construction of the statute that leads to such a result, cannot be proper. We are to construe all of its provisions in connection, and on the application of that rule, section 55 (*supra*) can have full effect, when it shall appear that one or more of the causes of separation has been proven, but that from the fact of condonation or other matter of defense, it would be improper for the court to decree or adjudge her such relief, and yet a judgment for support and maintenance might, in view of all the facts proven, be equitable and proper.

The case of *P. v. P.*, (24 *How. Prac. Rep. p. 197.*) appears to have been decided on that principle, or at least is consistent with it. That was an action for a limited divorce, and the learned justice, in his opinion, states that "the charge of cruel treatment, and on which this action brought for separation was predicated, was fully made out by proof on the trial of the cause," and then, after saying that the defense of recrimination was not

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established, he adds: "The defense of condonation, I am inclined to think, was made out;" and he states his reasons for that conclusion. He also, after referring to the history of the parties, remarks that, "as a man of wealth, and having reference to his habits and those of his wife, it may be added, a man of great wealth, he has not provided a suitable and proper maintenance of the wife and her children." This statement shows that the plaintiff, but for her condonation of the cause of action, would have been entitled to a judgment of separation, and that failing in obtaining that relief, her husband's former neglect to provide for her properly, in connection with the cruel treatment, of which he was found guilty, made it a proper case for the court to decree a reasonable provision for her future support and maintenance.

So, too, if the 55th section be read in immediate connection with the 51st, setting forth the three causes of separation, they may be construed as authorizing, in case any of these be established, either a judgment for separation with a suitable support and maintenance, or for such support and maintenance alone, or, as briefly and well expressed by the defendant's counsel in his points, "the fact or facts provided by the statutes being found to exist, separation may be decreed, with support, or a support without a decree of separation."

The three grounds for separation above specified, were substantially contained and provided for by the revised laws of 1813, (*vol. 2, p. 200, § 11,*) and upon either of them appearing to the court, a decree for a separation, or for a suitable support and maintenance, might be made. The subdivision of the matters contained in that section, by the Revised Statutes, into several sections, does not require a different construction to be given to the whole statute as an entirety.

The case of *Turrel v. Turrel*, (2 *John. Ch.* 391,) cited and relied on by the plaintiff's counsel to support the present

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judgment, was under the statute of 1813, and the chancellor, in making his decree that a legacy given to the plaintiff by her father's will, should be appropriated to her separate maintenance and support, evidently considered it to be necessary to entitle her to the relief so given, that the acts alleged as a sufficient ground for separation in her bill of complaint should be established. He says, in his opinion, after referring to the acts of ill usage by the defendant, of his wife, and his neglect to provide for her, "the statute declares that if it shall appear to the court that *such a charge as that contained in the bill is true*, it shall be lawful, whether the court shall decree a separation from bed and board or not, to make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as the nature of the case and the circumstances of the parties may render suitable and proper." He then adds: "Under the circumstances of this case, I deem it just and proper that the legacy given to the wife by her father should be appropriated for her separate maintenance and support."

I will add in this connection, that the justice making the decision in the case of *P. v. P.* (*supra*), appears by the tenor of his remarks to have been of the opinion that even if acts involving ill usage are established so as to justify a separation, yet such a judgment can be refused when the court is satisfied that there is not any danger thereof in the future, but that it might nevertheless be proper to provide for a support and maintenance.

My conclusion, therefore, after a careful consideration of the question, is that the judgment in favor of the plaintiff should be reversed, without costs of the appeal, and that a judgment should, instead thereof, be entered in favor of the defendant, and dismissing the plaintiff's complaint, without costs.

[KINGS GENERAL TERM, December 14, 1868. *Lott, Gilbert, J. F. Barnard and Tappan*, Justices.]

OSBORN vs. THE UNION FERRY COMPANY, of Brooklyn.

If a ferry company, at the very threshold of its gate, places a log, against which its passengers would be in danger of stumbling in the dark, it is bound to do every thing in its power to guard against the danger. If it omits to place a light near the obstruction, for the protection of passengers upon its boats, it is guilty of negligence.

The ordinary rule that a master is, in all cases, liable for the negligence of his servant, does not, unqualifiedly, apply to injuries caused by the negligence of a contractor, or his employees. Yet where the contractor has stipulated to use the necessary precautionary measures to protect the public against accidents, the owner or employer is relieved from responsibility.

The contract between the owner of property, and a contractor, for the making of certain improvements thereon, provided that "in case the owner shall be held or made liable for any injury arising out of neglect or willful default of the said party (the contractor) or any of their workmen, the owner may deduct any such amount as he may be obliged to pay on said account, from the contract price." *Held*, that this provision was inserted, not to shift the responsibility to third persons on the contractor, but to indemnify the owner for any damages which such persons might recover against him, on account of the negligence of the contractor.

The placing a piece of timber in the public street, and keeping it there, is the commission and continuance of a nuisance, being an obstruction of the full and free enjoyment of the easement.

The public being entitled to the use of the street or highway, whoever, without special authority, obstructs it, or renders its use hazardous, by doing any thing upon, above, or below, the surface, is guilty of a nuisance; and any one sustaining special damage from it, without any want of due care to avoid injury, has a remedy against the person continuing the nuisance.

The act is wrongful, and does not involve a question of mere negligence. Consequently, even if the contract between the owner of property and one undertaking to make improvements thereon, contains a provision that the latter shall use all precautionary measures to protect the public, such owner will nevertheless be liable for any damages sustained by an individual in consequence of the placing and continuance of a nuisance in the public street, at the procurement and with the concurrence of the owner of the property.

THIS action was brought to recover damages for an injury sustained by the plaintiff in consequence of alleged misconduct of the defendants.

The plaintiff, together with his wife, and other members of his family, on the 18th of February, 1863, about

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seven o'clock in the evening, crossed from Brooklyn to New York on one of the defendants' ferry boats. After crossing, he passed out of the ferry-house in the regular way for passengers, to get to an omnibus at the foot of Fulton street, New York. The night being dark, and no lamp being in the street, or on the premises of the defendant, to afford light to ferry or other passengers in that part of the street, the plaintiff stumbled over a piece of timber used to support a prop that upheld a cornice of the new ferry-house, which was then being built for the defendants. The exact place of the accident, and of the piece of timber over which he fell, was outside of the defendants' gate and premises, and on the public highway or street; but still, almost adjoining the gate. The new ferry-house was being erected by the Architectural Iron Works Company, under a contract with the defendants, by which that company was to put up the work according to specifications, in such manner as not to interfere with the operation of the ferry, and were to put up all necessary guards, and to perform all other due and proper acts and things for the safe protection of persons and property.

The action was tried at the New York circuit, in June, 1866, before Justice GROVER and a jury. When the plaintiff rested, the defendant moved to dismiss the complaint, which motion was denied. The defendants then called and examined a witness, and thereupon moved to dismiss the complaint, which motion was granted, and the plaintiff excepted. The exceptions taken on the trial were ordered to be heard, in the first instance, at a general term.

H. L. Clinton, for the plaintiff. I. The evidence proved beyond all doubt that the plaintiff was entirely free from fault or negligence. He passed out of the ferry-house in the usual way to reach the stages. At the time of the

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accident it was dark. There was no light, and it was impossible for the plaintiff to see the piece of timber over which he stumbled. The attempt on the part of the defendants to show there was a light, so that one would see the piece of timber, signally failed.

II. The evidence proved that the defendants were guilty of gross negligence, and that their negligence caused the accident. The defendants were grossly negligent in not providing lights, so that passengers at night, passing out of their ferry-house, could see the piece of timber supporting the prop which supported the cornice of the ferry-house. The testimony on this point proves gross and criminal negligence on the part of the defendants. Not to provide sufficient lights, by which persons could see their way out from the ferry-house to the street, was negligence on the part of the defendants. (*Johnson v. Hudson R. R. Co.*, 20 N. Y. Rep. 65.) In this case, (pp. 73, 74,) Denio, J., says: "Its determination (the question of defendants' negligence) depended on the view which should be taken of the tendency of driving a railroad train at considerable speed through a city street, not lighted, on a dark evening, and without any proper means of giving notice to persons who might be upon the track, and without any lamps on the cars to enable the driver to see what might be upon the rails before him. *That such running was hazardous, in a high degree, I cannot doubt.*"

III. The defendants, as common carriers, were bound to use the highest degree of human foresight and skill to provide for the safety of their passengers, while only ordinary prudence is required of the passenger. Smith, J., in *Willis v. Long Island R. R. Co.*, (34 N. Y. Rep. 679,) in delivering the opinion of the court, says: "It is the duty of a carrier to exercise the highest degree of human foresight and skill to provide for the safety of his passengers." Emott, J., in the same case, (32 Barb. 403,) says: "The carrier is bound to the exercise of all possible skill, foresight

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and care. The passenger is bound to conduct himself with due and ordinary prudence, such as a careful man would use under the circumstances." Porter, J., in *Besiegel v. N. Y. Central R. R. Co.*, (31 *How. Pr. Rep.* 191,) says: "The plaintiff owed no duty to the defendants beyond the exercise of ordinary care." The defendants, as common carriers, were bound to safely land their passengers, so as to enable them to reach the street without injury.

IV. The defendants cannot shift the liability for injuries sustained by the plaintiff upon the Architectural Iron Works, by reason of the fact that they, under a written contract with the defendants, were then erecting a new ferry-house. It was the duty of the defendants to keep the access to and from their ferry-house free and clear of all obstructions, and well lighted at night. At the time of the accident to the plaintiff, the defendants were in the use and occupation of the ferry-house, in the prosecution of their business as common carriers. Smith, managing director of the Union Ferry Company, testified that they used the ferry-house the same as usual at the time of the accident. The defendants were not only in the use and occupation of the ferry-house, but they appropriated to their almost exclusive use the sidewalk in front of it. The defendants put down flagging in front of the ferry-house, and repaired it for their own use, whenever it needed repairing. They put down posts for their own use in front of the ferry-house. Before making any progress towards shifting the liability for accidents from defendants to the Architectural Iron Works, it must appear: 1. That the former contracted with the latter to guard against accidents by using lights and guards; and, 2. That the defendants had no control over the premises, and were not in the use and occupation of them at the time of the accident. In no case has it been held that the owner can shift the liability upon the contractor, unless the contractor

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has stipulated to use the necessary precautionary measures to protect the public against accidents. In the case at bar, the contract between the defendants and the Architectural Iron Works does not provide that the Architectural Iron Works shall, during the erection of the ferry-house, provide lights, barriers, or use any precautionary measures whatever to protect the public or the passengers of the defendants against accidents. The only provision in the contract, relating to the subject, is the following: "In case the owner shall be held or made liable for any injury arising out of the neglect or willful default of the said party of the second part [Architectural Iron Works] or any of their workmen, the owner may deduct any such amount as he may be obliged to pay on that account, from the contract price." In the *City of Buffalo v. Halloway*, (3 Seld. 493,) it was held that a contractor who had undertaken to construct, for a municipal corporation, a sewer in a public street, was not responsible to it for damages to which it had been subjected in consequence of his leaving the sewer, during its construction, exposed, by means whereof one passing along the street fell in and was injured, because the contract did not provide that he should, by lights, barriers, or other precautionary measures, protect the public against accidents. In *Tully v. The Mayor*, (1 Kern. 432,) it was held that the corporation of the city of New York, which had ordered a street to be graded, and contracted with a person to do the grading, was not liable for damages caused by the negligence of the workmen employed by the contractor in performing the work. In this case it appeared (p. 433) that the contractor, by the terms of the written contract, "was bound to erect a fence across the end of the work, and, during the night, to keep burning proper and sufficient lights on and near the work, and to take all other necessary precautions for the prevention of accidents or injuries to person or property." In *Storrs v. The City of Utica*, (17 N. Y. Rep. 104,) it was alleged that

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the defendants caused a sewer to be excavated in Genesee street, "and carelessly left and permitted the excavation to remain open in the night time, without any guard, barrier or protection, to keep travelers from falling therein, and without any lamps or lights to enable passengers to discover the danger, by reason of which negligence the plaintiff drove a wagon into the sewer, and was injured." The defense was, that "the work was excavated by one Shipman, under a contract which contained no stipulation in respect to any precautions for the safety of travelers." The court held, that the defendants were liable for the injury to the plaintiff, and that they could not shift their liability upon Shipman. The court below charged, "That if, in the course of a public improvement, it became necessary for the city corporation to make an excavation in a street, so as to render it unfit or dangerous to be traveled upon, it became the duty of the city to take measures, either by lighting the street or otherwise, to warn travelers of the danger, and that this duty did not rest upon the contractor, unless he had specially agreed to perform it." This charge was held to be correct. Upon the doctrine of these cases, how can the contractors, the Architectural Iron Works, be held liable, they never having contracted to use any precautionary measures against accidents to travelers? In *Congreve v. Smith* (18 *N. Y. Rep.* 79) the action was brought to recover damages for injury sustained by the plaintiff by the breaking of a flagstone, forming part of the sidewalk adjoining a building and lot of the defendants in the city of New York. The defendants contracted with B. and R. Barton to do the work. Under an employment with the latter, one Houghy furnished and set the stone. No license or authority from the city to thus use and occupy the sidewalk was proved. The defense contended that the liability for the injury rested upon the builders, and not on the owners. The judge charged the jury, that the defendants were responsible for

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the Bartons, or any one employed by them, and that "the suit stands against the defendants the same as if it were brought against the Bartons or Houghey." The Court of Appeals held that this charge was correct, and that the defendants were responsible for the injury, and could not shift their liability upon the contractors. In the case at bar, it nowhere appears, nor was there any pretense that the Union Ferry Company had any permission from the city to incumber the sidewalk by the erection of their new ferry-house, or by putting pieces of timber underneath props to support the cornice of the building. STRONG, J., at pages 81, 82, in delivering the unanimous opinion of the court, says: "The area was under the surface of the public street, and was maintained for the benefit of the property of the defendants, and the stone was placed over it, under contractors with the defendants, for the completion of the defendants' building, in pursuance of the contract. No license from the city for the area was proved." (See also *id.* p. 83.) In *Creed v. Hartmann*, (29 N. Y. Rep. 591,) it was held that persons contracting with the owner of lots to build a block of houses thereon, who make a sub-contract with another to make all the necessary excavations by digging the ground, blasting the rock, &c., the latter stipulating to guard against accidents by proper precautions, and to make good all damages, are liable for an injury by an individual who falls into an excavation in the sidewalk through the negligence of the sub-contractor or his servants, in not having the same properly protected. Upon the doctrine of this case, and *Congreve v. Smith*, the defendants, the Union Ferry Company, would be liable, even if the Architectural Iron Works had contracted—which they did not—to use the precautionary measures necessary to guard against accidents.

V. The defendants caused the injury to the plaintiff by their neglect, in not having their ferry-house, and the access to and from it, sufficiently lighted. If the defend-

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ants did not put the stick of timber under the prop which supported the cornice, and had no control over it, they had control so far as placing lights to guard against accidents was concerned. The piece of timber under the prop would have been harmless, but for the neglect of the defendants in regard to lights. The principle underlying all the cases in which liability for injuries sustained by travelers has been shifted from the owner to the contractor, is, that the owner is not in the occupation of the premises, has no control over them, and does not select the workmen—employees of the contractor—whose negligence causes the injury. There is no authority which holds that an owner, in the occupation of premises, is not responsible for injuries sustained by those whom he invites upon his premises for purposes of his own business, when, by the exercise of ordinary prudence, he could have avoided such injuries by placing lights, so as to point out the danger. Certainly, a common carrier, who is held to the highest degree of vigilance and care, cannot escape liability for injuries occurring under such circumstances.

VI. The defendants, in permitting the piece of timber over which the plaintiff fell, to remain where it was used to support the cornice of the ferry-house without having proper and sufficient lights to guard passengers against the danger, were guilty of a nuisance in obstructing the highway, and on that ground are clearly liable to the plaintiff for the damages sustained by him. In *Dygert v. Schenck*, (23 *Wend.* 446,) it was held that where the owner of land over which a public highway passes, digs a raceway across the road to conduct water to his mill, and builds a bridge over the raceway, and an injury is sustained by any one in consequence of the bridge being out of repair, such owner is liable in damages to the party aggrieved. It was also held, in that case, that the person who thus interfered with the highway was liable if an injury occurred, though he used the utmost care to pre-

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vent it, unless the party injured was guilty of *gross negligence*. In *Congreve v. Smith*, (18 N. Y. Rep. 82,) Strong J., says: "The general doctrine is, that the public are entitled to the street or highway in the condition in which they placed it, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing any thing upon, above or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful." *Harlow v. Humiston* (6 Cowen, 189) was an action for a nuisance in wrongfully placing logs and tree tops in the highway, by means of which the plaintiff's horse, being frightened, ran upon a tree top and was killed. The court held that the defendant was liable for damages which resulted from this obstruction of the public highway. *Savage*, Ch. J., (p. 192,) in delivering the opinion of the court, says: "It is no doubt a nuisance to dig a ditch or lay logs in the highway; and whoever sustains an injury from such a cause, without any fault of his own, may maintain an action against the author of it."

VII. Even if the Architectural Iron Works were liable to the plaintiff for the injuries sustained by him, the defendants would be equally liable; and, in that event, the plaintiff can maintain his action against both, jointly, or against either, separately. (*Congreve v. Smith*, 18 N. Y. Rep. 79. *Creed v. Hartmann*, 29 id. 591. *Davenport v. Ruckman*, 37 id. 568. *Anderson v. Dickie*, 1 Rob. 238.)

B. D. Silliman, for the defendant. I. The plaintiff's exceptions to the rulings of the court admitting evidence are immaterial. The evidence so admitted did not affect the court on the motion to dismiss the complaint. It could, in any view, be objectionable only as regards the

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jury. As the case did not go to the jury, the rulings so excepted to were wholly unimportant. The rulings were correct. It was part of the plaintiff's case that it was carelessness, by reason of want of light, to place the prop where it was. The testimony tended to show that the interior of the ferry-house was lighted; that there were windows through which such lights shone; and that, at the time, the defendants conducted their business just as they did before the erection of the new building was begun. It was proper, therefore, to show what were such previous use and conduct of the premises and business, and that it included the lights testified to by the witness. The question allowed, as to any other accident having occurred from the prop, was admissible in meeting the testimony of the plaintiff's witness Butler, that a person had fallen over it at mid-day. It was further admissible, as showing that it could not have been an improper obstruction, when 25,000 to 30,000 persons passed it *per diem*, and no accident had resulted, although it had been there some seven to fourteen days; and it would be for the jury to say whether the plaintiff's accident, under such circumstances, must not have resulted from his own carelessness.

II. The plaintiff's case against the defendants as common carriers, entirely fails by his own evidence that his passage was ended, and he had left their premises. He says: "After leaving the boat, I passed up the bridge, and then out at the gate nearest the ticket office. * * I turned to the left to go to the stage." He shows that the *locus in quo* of his accident was outside of the defendants' premises and on the public street. He says: "The whole of it was an open street up to the ferry-house." His witnesses testify to the same thing.

III. Nor can he recover on the ground that the defendants had erected an obstruction from which the injury resulted. This is expressly disproved.

IV. The whole work being done by the "Architectural

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Iron Works," under the contract in evidence, the defendants were not liable for the negligence or carelessness of the contractors. The plaintiff's recovery, if he is entitled to recover at all, must be against the contractors, and not against the defendants. (*Blake v. Ferris*, 1 *Seld.* 48. *Pack v. The Mayor &c.*, 4 *id.* 222. *Kelly v. The Mayor &c.*, 1 *Kern.* 432. *Norton v. Wiswall*, 26 *Barb.* 618. *Benedict v. Martin*, 36 *id.* 288. *Overton v. Freeman*, 8 *Eng. L. and Eq.* 479.) In *Knight v. Fox & Henderson*, (1 *Eng. L. and Eq.* 477,) a railway company had entered into a contract with A. to construct a branch line; A. contracted with B. to erect a bridge, part of the work. B. had a surveyor, C., whom he paid by a salary of £250 per annum, to attend to his general business; and after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive £40, irrespective of his salary; B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a sleeper fixed to the pavement of the highway, and owing to the want of sufficient light to warn the passers by, the plaintiff stumbled over it and broke her leg; subsequent to which additional lights were placed on the spot, and B. paid for them. *Held*, that B. was not liable, and that the plaintiff's remedy lay against C.

By the Court, CLERKE, P. J. I. Unless the defendant was relieved from responsibility by the contract with the Architectural Iron Works Company, assuming for the present that the question of negligence is involved in this case, I am inclined to the opinion that it was guilty of negligence in not having light in some place on its premises, near enough to protect passengers coming out of the gate. A light could have been placed, without difficulty, on some part of the premises, to enable passengers to avoid any obstruction placed by them so near the exit for passengers, that without such a light ordinary care would

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scarcely enable them to do so. If a ferry company at the very threshold of its gate places a log, against which its passengers would be in danger of stumbling in the dark, I think it is bound to do everything in its power to guard against the danger; and the omission to do so is negligence. Passengers, without being previously informed of it, are not apt to suspect such danger, and passing out in the crowd, have their attention diverted from the apprehension of it. It was proven in the case before us that the piece of timber over which the plaintiff fell could not be seen unless a person was expressly looking to see it. It was a dark, misty night, and there was no light around the ferry-house. A light, as I have already said, could have been placed somewhere on the defendants' premises, contiguous to the place where the timber was placed; and the omission to do so was such negligence as would make it liable for damages, to the plaintiff, unless it is relieved from liability by the fact that it was placed there by the Architectural Iron Works Company in the course of performing a contract by which they undertook to erect a new ferry-house for the defendant.

II. The recent reports abound with decisions defining and fixing the liability of persons on whose premises accidents occur, while work was being performed there under a contract between them and another person. Undoubtedly, the absolute liability of owners has been greatly modified. The ordinary rule, that the master is, in all cases, liable for the negligence of his servant, does not, unqualifiedly, apply to injuries caused by the negligence of a contractor or his employees. But I think the sum of all the recent decisions is, that where the contractor has stipulated to use the necessary precautionary measures to protect the public against accidents, the owner or employer is relieved from responsibility. (*See City of*

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Buffalo v. Holloway, 3 Seld. 493; *Storrs v. City of Utica*, 17 N. Y. Rep. 104.)

In this case, the contract between the defendant and the Architectural Iron Works Company does not provide for the use of any such precautionary measures. To be sure, the contract provides that "in case the owner shall be held or made liable for any injury arising out of neglect or willful default of the said party, (the Architectural Iron Works Company,) or any of their workmen, the owner may deduct any such amount as he may be obliged to pay on said account from the contract price." This provision was obviously inserted, not to shift the responsibility to third persons on the contractor, but to indemnify the owner for any damages which such persons may recover against him, on account of the negligence of the contractor.

III. But the question involved in this case is something more than a question of negligence. The piece of timber, over which the plaintiff fell, was placed and continued in the public street at the procurement and with the concurrence of the defendant. The placing of it there, and keeping it there, was the commission and continuance of a nuisance. It was an obstruction of the full and free enjoyment of the easement. The public being entitled to the use of the street or highway, whoever, without special authority, obstructs it, or renders its use hazardous, by doing any thing upon, above or below the surface, is guilty of a nuisance; and any one sustaining special damage from it, without any want of due care to avoid injury, has a remedy against the person continuing the nuisance. The act is wrongful, and does not involve a question of mere negligence; and consequently, in the case before us, even if the contract between the defendant and the Architectural Iron Works Company contained a provision that the latter should use all precautionary measures to protect the public, nevertheless, the defendant would be liable

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for the damages sustained by the plaintiff. (*See Congreve v. Smith*, 18 *N. Y. Rep.* 79; *Creed v. Hartmann*, 29 *id.* 591.)

The judgment should be reversed, and a new trial ordered; costs to abide the event.

GEO. G. BARNARD, J., concurred.

SUTHERLAND, J. It was the duty of the defendants to furnish or keep lights, so that their passengers going to and from the boat might, with ordinary attention, have seen the stick of timber. I concur in saying that there should be a new trial, with costs to abide the event.

New trial granted.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerks, Sutherland and Geo. G. Barnard, Justices.*]

BUTT vs. CAMERON.

A cause of action for alleged tortious acts of the defendant, as a director and president of a bank in South Carolina, cannot be joined in the same complaint with one for an alleged liability of the defendant as a stockholder under a statute of South Carolina.

Where such complaint does not show, or state facts sufficient to show, that the plaintiff as a bill holder was injured or damaged by the alleged acts of malfeasance and misfeasance of the defendant, as a director and as president, &c. it does not state facts sufficient to constitute a cause of action; especially where it does not even state that the plaintiff was the holder of the bills or bank notes, or any of them, when the alleged acts of malfeasance and misfeasance were committed.

A count in a complaint, alleging that the defendant is a stockholder in a bank located in South Carolina, (without stating the amount of his stock,) and that under and by virtue of a law of that state, the defendant is liable to the creditors of said bank, as such stockholder, in the sum of double the amount of his stock, &c., does not state a valid cause of action; the fair inference from the complaint, and from the law as far as stated, being that the liability of the defendant as a stockholder can only be enforced in the courts of South Carolina.

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APPEAL by the defendant from an order made at a special term, overruling a demurrer to the complaint.

The plaintiff alleged in his complaint, first: That under and by virtue of a law of the state of South Carolina, enacted and of force on a date previous to the fifth day of September, 1853, and yet in force, there exists a corporation doing business in the town of Chester, in said named state, and known and incorporated as the Bank of Chester. That under and by virtue of the chartered privileges conferred by the statute above referred to, the parties concerned duly organized the banking corporation aforesaid, procuring and appointing a place of business, electing a board of directors and a president thereof, and by other acts signifying and denoting their acceptance of the charter so granted, and the privileges therein and thereby conferred. That in pursuance of the objects and purposes so indicated, the aforesaid Bank of Chester, so organized and established, received deposits of moneys, issued their checks, bills of exchange, and promissory notes payable on demand, and did and performed divers other transactions and things within the purview and purpose of the said act of incorporation, and the organization, as before stated, thereunder had. That on or before the fifth day of January, 1855, the defendant was duly and legally constituted one of the directors of the said Bank of Chester, and was likewise, on or before the said fifth day of January, 1855, duly and legally constituted the president of the said board of directors, in which capacity he has since continued to act, intrusted with the general supervision and direction of the affairs of said bank, thereby becoming and being a trustee for the interest of the parties immediately concerned, and more especially for the benefit and protection of the lawful creditors of every kind and description of said bank. That under the direction of the president and board of directors, the said Bank of Chester made, or caused to be made and issued, or caused

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to be issued for valuable consideration, a large number of its promissory notes for circulation as money, made payable on demand, and done in pursuance of the chartered privileges aforesaid; and that said notes were issued in sums of five, ten, twenty, fifty, and one hundred dollars each, as occasion required, and bearing date on various days subsequent to the said fifth day of September, 1853, and before the bringing of this suit. That at a period subsequent to the issue of the notes aforesaid, to wit, on or about the first day of January, 1862, the said Bank of Chester suspended payment of its said notes; and that said bank now continues, and has since continued, in a state of notorious and publicly known suspension as to the said issues, and as to all others of the liabilities of the said bank. That the said Bank of Chester was, previously to the first day of May, 1861, and for some time thereafter, in a good and solvent condition as to its liabilities in every form, and especially as to its liabilities on its promissory notes aforesaid. That since the period aforesaid, the said Bank of Chester has become insolvent and utterly unable to pay its liabilities, and is now so insolvent and utterly unable to pay. That the plaintiff has at various times since the said fifth day of January, 1855, become the lawful holder and owner, for valuable consideration and in the usual course of business, and is now such lawful holder and owner, of a large amount of the notes of the said Bank of Chester, to wit, of nine thousand six hundred and thirty dollars. That the insolvency of the said Bank of Chester was occasioned by numerous and various acts of willful malfeasance and misfeasance of the defendant aforesaid, in his said capacity and position of president. That among other such acts of willful malfeasance and misfeasance, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under the order and direction, or by the approval of the said defendant, as president thereof, dis-

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posed of large sums of the good, valid, and valuable assets of the said bank for the notes, bills, bonds, or other forms of credit of the so-called Confederate States of America, in contravention of public policy and the laws and constitution of the United States, and in violation of the rights and interest of the creditors of said bank. That further, among the acts of willful malfeasance and misfeasance aforesaid, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under the order and direction, or by the approval of the said defendant, as president thereof, incurred heavy liabilities to third and outside parties, dealing in the character of depositors, by receiving from said parties or depositors the notes and other forms of credit of the so-called Confederate States of America, and in many cases repaying said deposits with good, lawful and valid assets and claims of the said bank. That among the acts of willful malfeasance and misfeasance aforesaid, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under the order and direction of the said defendant, as president thereof, or with his approval, made large and at the same time unlawful contracts and agreements with other parties not known to the plaintiff; and that in many cases these unlawful contracts and agreements were settled by the use of the good, valid and valuable assets of said bank, under the order and direction of the defendant, as president thereof, or by his approval. That further, among the acts of willful malfeasance and misfeasance aforesaid, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under the order and direction of the said defendant, as president thereof, or by his approval, caused to be sold large sums of the assets of said bank, at credit in the banks of New York, London, Liverpool and elsewhere, taking in exchange therefor the notes, bonds, or other credits of the so-called Confederate States of America.

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That further, amongst the acts of willful malfeasance and misfeasance aforesaid, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under and by the order and direction of the said defendant, as president thereof, or by his approval, took and received in exchange for the good promissory notes, bills of exchange, and other forms of good and solvent indebtedness to said bank, in large sums thereto due and payable, the notes or other forms of credit of the so-called Confederate States of America, to the detriment and injury of the *bona fide* creditors of said bank, and of this plaintiff as among said creditors. That further, among the acts of willful malfeasance and misfeasance aforesaid, the said Bank of Chester heretofore, to wit, at various times since the said first day of May, 1861, under and by the order and direction of the said defendant, as president thereof, or with his approval, disposed of gold and silver coin, and other valuable assets of said bank, without receiving therefor good and valuable consideration and security, in contravention of public policy and the laws of the land, and in utter violation of the rights and interests of the *bona fide* creditors of said bank. That further, among the acts of willful malfeasance and misfeasance aforesaid, the said defendant heretofore, to wit, at various times since the said first day of May, 1861, employed valuable assets of said Bank of Chester in purposes of speculation for his own individual gain and benefit, or permitted to be so employed by other directors or managers of said bank, in the violation and disregard of his obligations and duties as president thereof, and as trustee aforesaid, whereby the said bank was greatly damaged and its valuable assets wasted, to the detriment, loss and injury of the *bona fide* creditors of said bank. That the said defendant, at various times since the said first day of May, 1861, has done, or caused to be done and allowed, the various acts of willful malfeasance and

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misfeasance hereinbefore recited, and many others not named, in contravention of public policy and the laws of the land, and in utter violation and disregard of his duties, and obligations as president of said Bank of Chester, and as trustee for the interest, benefit and protection of said bank and the creditors thereof, whereby the said Bank of Chester has become totally and ruinously insolvent, its valuable assets wasted and destroyed, and the said bank thereby rendered unable to pay its creditors and the lawful demand to be made there against.

Second. That the defendant is a stockholder in the said Bank of Chester, and that under and by virtue of a law of the state of South Carolina aforesaid, the said defendant is liable to the creditors of said bank as a stockholder thereof, in the sum of double the amount of his said stock, or some other proportionate sum. That the specific amount of the stock so held by the said defendant is unknown to the plaintiff; but that in such sum or amount, whatever it may be, the said defendant, by reason of the matter hereinbefore set forth, and of his position as stockholder aforesaid, and by virtue of the said named law, is liable to the plaintiff as creditor of the said bank. Wherefore, and by reason of the unlawful acts thereinbefore recited, alleged and complained of against the said defendant, and of others not therein recited, and by reason of the position of the said defendant as stockholder aforesaid, the defendant has become and is liable to the plaintiff for and upon the notes of the said Bank of Chester now held by the plaintiff, to wit, for the sum of nine thousand six hundred and thirty dollars, together with the interest thereupon accrued and to accrue since the first day of January, 1862, the date of the suspension of payment of the said bank, as before set forth. Wherefore the plaintiff demanded judgment against the defendant for the sum of nine thousand six hundred and thirty

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dollars, with interest thereupon from the said first day of January, 1862, together with the costs of this action.

The defendant demurred to the plaintiff's complaint, and for causes of demurrer specified the following:

First. That in the said complaint several causes of action have been improperly joined; one being a cause of action on contract, wherein the defendant is sought to be made individually liable as a stockholder of the Bank of Chester, in the state of South Carolina, under an alleged law of the said State, to the creditors of the said bank, in the sum of double the amount of his stock or some other proportionate sum; and another being a cause of action, wherein the said defendant is sought to be made liable as a director and president of the said bank, for malfeasance in the management of the affairs of the said bank.

Second. That the said complaint does not state facts sufficient to constitute a cause of action.

The cause coming on for trial at special term, in its order, on the issues of law joined by the demurrer, it was ordered that the demurrer be overruled, without prejudice to the defendant, to move within twenty days to compel the plaintiff to elect by which of the two distinct causes of action he will abide, and to strike out all not necessary to that; with leave to defendant to answer within ten days after the decision of the motion.

The defendant appealed.

Joe. H. Dukes, for the appellant.

J. S. Winter, for the respondent.

By the Court, SUTHERLAND, J. I understood the counsel of the plaintiff to concede, on the argument, that there was a misjoinder of causes of action in the complaint. There plainly was; for the first cause of action which the complaint undertakes to state is plainly for certain alleged

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tortious acts, and the second is for an alleged South Carolina statute liability, as a stockholder, which certainly cannot be viewed as an action for a tort.

Nor can it be said that the two pretended causes of action arose from the same transaction or transactions, connected with the subject of the action.

But the demurrer for misjoinder is quite immaterial in this case, for it is plain, I think, that the second ground of demurrer—that the complaint does not state facts sufficient to constitute a cause of action—is well taken.

The first count, or that part of the complaint which undertakes to state a cause of action against the defendant as a director, and as president, &c., more especially as president, &c., does not state facts sufficient to constitute a cause of action, for the reason, among others, that it does not show, or state facts sufficient to show, that the plaintiff as a bill-holder was injured or damaged by the alleged acts of malfeasance and misfeasance of the defendant. The complaint does not even state that the plaintiff was the holder of the bills or bank notes, or any of them, when the alleged acts of malfeasance and misfeasance were committed. From aught that appears on the face of the complaint, the plaintiff bought the bills or bank notes of which he is the holder, on speculation, with a knowledge of all the alleged wrongful acts. Besides, I am not prepared to say that the plaintiff could bring the action against the defendant without any presentment of the bank bills or notes for payment.

Moreover, I am not prepared to say that the acts alleged in the complaint to be acts of malfeasance and misfeasance, are shown by the complaint to be or to have been acts of malfeasance or misfeasance.

It can hardly be contended that the other count or part of the complaint states a cause of action. The South Carolina law is not stated so as to show the liability of the defendant by it. The fair inference is not that the

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plaintiff, as the holder of the bank notes or bills, is a creditor within the meaning of the South Carolina act, as far as it is stated.

The amount of stock held by the defendant is not stated, and is conceded in the complaint to be unknown; and the fair inference from the complaint, and from the law as far as stated, is, that the liability of the defendant as a stockholder could only be enforced in the courts of South Carolina.

The order appealed from should be reversed, with costs, and there should be judgment for the defendant on the demurrer, with costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Sutherland and Geo. G. Barnard, Justices.*]

FASNACHT *et al.* vs. STEHN.

Matter set up as a separate and distinct defense, in an answer, must be viewed as a pleading, under section 152 of the Code. Sham and irrelevant answers and defenses may be stricken out; but under this section, neither an entire answer or defense, nor a part of an answer or defense, can be stricken out as *redundant*.

Under section 160 of the Code, irrelevant or redundant matter in a pleading may be stricken out; but this section does not authorize an *entire* answer, or an entire defense in an answer, to be stricken out as irrelevant or redundant. By irrelevant or redundant *matter* in this section, is meant matter impertinently or unnecessarily stated, in setting forth *the cause of action in the complaint, or the defense, or a defense, in the answer*.

Although an answer or defense be *frivolous*, it does not follow that it is, or must be, *irrelevant*, also.

If matters set up in an answer are *relevant* to the cause of action stated in the complaint; that is, if they relate or pertain to it; they cannot be deemed irrelevant.

Where an issue is formed upon an answer setting up a defense equivalent or amounting to the plea of *nisi tunc record*, it is irregular for a judge to proceed at chambers, without a jury, to try that issue and to find his conclusions of fact and of law, and order judgment for the plaintiff.

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The issue formed upon a plea of *nul tiel record* is an issue of fact, within the provision of the Revised Statutes requiring all issues of fact to be tried by a jury, except in case of a reference. (2 R. S. 409, § 4.)

A PPEAL from an order and judgment entered at a special term.

By the Court, SUTHERLAND, J. In my opinion, both the order and judgment appealed from, should be reversed, but without costs.

The action was brought on a Louisiana judgment. The answer of the defendant purported to set up three distinct and separate defenses. The learned judge at chambers, on motion of the plaintiffs, struck out the whole of the answer setting up, or undertaking to set up, the second and third defenses, as "redundant and irrelevant matter," leaving the first defense to remain; and then, treating *that* defense as equivalent or amounting to the plea of *nul tiel record*, proceeded at chambers, without a jury, to try that issue, and to find his conclusions of fact and of law, and ordered judgment for the plaintiffs.

Matter set up as a separate and distinct defense in an answer, must be viewed as a pleading. Under section 152 of the Code, "sham and irrelevant answers and defenses" may be stricken out, but under this section, neither an entire answer or defense, nor a part of an answer or defense, can be stricken out as *redundant*. This section says nothing about *redundancy*.

Under section 160 of the Code, "irrelevant or redundant matter in a pleading" may be stricken out, but this section does not authorize an *entire* answer, or an entire defense in an answer, to be stricken out as irrelevant or redundant. By irrelevant or redundant *matter*, in *this* section, is meant matter impertinently or unnecessarily stated, in stating *the cause of action in the complaint, or the defense or a defense, in the answer*.

The question is, then, whether the second and third de-

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fenses of the defendant's answer should have been stricken out, under § 152 of the Code, as *irrelevant*.

Now it appears to me impossible to say that the matters set up in these defenses are *irrelevant*. They are certainly *relevant* to the cause of action stated in the complaint; that is, they relate or pertain to it. You might concede that defenses were and are even *frivolous*, but it would not follow that they are irrelevant. By the Code, and by the dictionaries, if an answer or defense is *frivolous*, it does not follow that it is, or must also be, *irrelevant*.

I think, therefore, that the order striking out the second and third defenses, as *redundant and irrelevant*, was erroneous.

Moreover, I am of the opinion that the trial of the issue formed by the first defense, which the learned judge must have treated as being or as amounting to the plea of *nul tiel record*, was irregular.

The Revised Statutes (2 R. S. 409, § 4) provide that "all issues of fact, joined in any court, proceeding according to the course of common law, shall be tried by a jury, except where a reference shall be ordered."

In *Trotter v. Mills*, (6 Wend. 512,) the Supreme Court of this state held that the issue formed by the plea of *nul tiel record* was an issue of fact, within this provision of the Revised Statutes, and was to be tried by a jury.

I cannot discover that the Code has changed the manner of trial of such an issue of fact, or taken away the right of the defendant to have such an issue tried by a jury. (Code, § 253.) He could waive his right of a trial by jury, (Code, §§ 253, 266,) but I cannot discover in the case any ground for saying that he did waive it. He had notice of the motion to strike out, and for judgment, but I cannot discover that he had notice of the *trial*.

I do not think that the circumstance that the defendant excepted to the finding of fact and to the conclusion of law, can be regarded as a waiver of a trial by jury, or as estop-

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ping him from taking the ground, on this appeal, that the trial by the judge at chambers was irregular.

Besides, if the order striking out &c. is reversed, as I think it should be, the judgment must fall with it.

Both the order and judgment should be reversed, without costs, irrespective of the question whether the matters set up in the second and third defenses, or either, are or are not a defense to the action.

GEO. G. BARNARD, J. dissented.

[NEW YORK GENERAL TERM, JANUARY 4, 1869. *Clerks, Sutherland and Geo. G. Barnard, Justices.*]

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MILLER AND COATES vs. THE MAYOR & CO. OF THE CITY OF NEW YORK.

Upon a sale of lots belonging to the defendants, by the commissioners of the sinking fund, in April, 1852, the terms of sale were—ten per cent to be paid in cash, with expenses of the sale, immediately; fifteen per cent to be paid on the 1st of May, 1852, when the deed was to be delivered; and the remaining seventy-five per cent to be secured by bond and mortgage for five years. K. & B. purchased twelve of the lots, at said sale, upon the above terms, and paid ten per cent of the purchase money and expenses of sale, but failed to pay the fifteen per cent, and execute a mortgage for the remainder of the purchase money, on the 1st of May. On the 16th of December, 1852, they assigned their bid to the plaintiffs, and the comptroller of the city promised that, upon payment of the fifteen per cent, and the execution of a mortgage for the balance by the plaintiffs, the property would be conveyed to them.

Held that the defendants were bound by this arrangement between the plaintiffs and the comptroller; and that by such arrangement the default of K. & B. in not paying the fifteen per cent on the 1st of May, and giving their bond and mortgage for the remainder of the purchase money, was *waived* by the defendants.

And the plaintiffs having, in reliance upon this arrangement, paid to K. & B. the ten per cent and the auctioneer's fees; *Held* that they were entitled to a specific performance of the contract of sale.

Held, also, that a delay which subsequently took place, until August, 1858, when the plaintiffs tendered the amount of purchase money due, with inter-

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est, having occurred by mutual consent of the plaintiffs and the comptroller, from time to time, without any fault of the plaintiffs, the defendants were bound by the action of the comptroller, in the matter of postponing the delivery of the deed; and that the statute of limitations did not commence running against the plaintiffs until the refusal of the comptroller to deliver the deed, in August, 1858.

APPEAL from a judgment entered upon the report of a referee.

The defendants, the corporation of New York, sold upwards of 500 lots in April, 1852, at public auction, among these the lots involved in this suit. These lots, twelve in number, were bought by King & Brush, in the name of Brush. Ten per cent of the purchase money was paid on the day of sale by the purchaser, pursuant to the terms of sale, at the office of the comptroller, to the collector of the city revenue, who, under the direction of the comptroller gave a written receipt and memorandum in writing, signed by him as such collector, describing the property, and stating the consideration of the purchase, and the party purchasing. No deed was prepared by the defendants, and the purchase had not been completed up to December following, when the purchaser proposed to assign his bid to the plaintiffs. The plaintiffs met him at the comptroller's office, and the comptroller, in behalf of the corporation, assented to the sale and assignment of the bid, stating that ten per cent had been paid by Mr. Brush, and that if the plaintiffs purchased his said bid they would be accepted in his place, and the deed would be made out to the plaintiffs. They thereupon paid Brush the ten per cent, and the auctioneer's fees, and the comptroller directed the deed to be made out to them, the plaintiffs' names being by the comptroller's directions substituted in the books of the corporation as the purchasers. The deed was thereupon prepared and executed by the defendants, under the direction of the comptroller, and was approved by the then counsel to the corporation, Henry E. Davies.

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The plaintiffs having been directed to call in a few days for the deed, did so, and by mutual consent the completion of the purchase was postponed. A new comptroller came in, and the comptroller's office was moved. In moving, the books had been disarranged, and the entry of ten per cent could not be found. The plaintiffs called to complete the purchase, and the comptroller requested them to wait until the entry could be found, and they did so. The plaintiffs called frequently; they were desirous of getting their deed, but the entry was not found in the comptroller's book until 1858. The property, meanwhile, had been taxed to the plaintiffs, and they paid the taxes for three years. This delay having taken place at request of the comptroller, until the time of the mortgage had expired, the plaintiffs desired still to leave part of the purchase money on bond and mortgage. The comptroller expressed himself as favorable to this, but doubting his authority to take a mortgage, took the matter into consideration and finally referred it to the commissioners of the sinking fund, who took action in the matter which was not communicated to the plaintiffs until August, in that year, when the then comptroller, Mr. Flagg, refused to deliver the deed. The plaintiffs immediately made a tender of the full amount of the purchase money and interest, and demanded the deed, which was then executed and in the comptroller's hands. The matter was followed up by the plaintiffs, who applied by mandamus to compel the delivery of the deed. This was refused, the plaintiff having a remedy by suit; and in July, 1864, within six years from the refusal, this action was brought to compel specific performance by a conveyance of the property. On the trial, the defendants' counsel moved to dismiss the complaint upon the following grounds, viz:

First. The evidence fails to establish any cause of action against the defendants. No claim or right of action can

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be based upon any agreement upon the part of the controller to extend the time of performance.

Second. There was no tender of performance at any time, nor could there have been, by reason of the omission of King & Brush to pay the balance of the purchase money (or to give the mortgages required by terms of sale.) The only tender alleged to have been made by the plaintiffs occurred on the 11th August, 1858, more than six years after the day upon which King & Brush were to perform (May 1, 1852.) The plaintiffs are barred by the statute of limitations, even admitting that the tender was a good one. This action, as appears from the records, was not commenced until twelve years after the sale, namely, August 3, 1864. Even if the statute of limitations is not a bar, time was of the essence of the original contract, and a court of equity will not decree specific performance in favor of the party in default, who has omitted to do what he had contracted to do.

Third. But even if this is not so, the court will refuse its equitable aid or interference when the lapse of time and when the delay has been so great as to constitute laches disentitling the parties to its aid, and evidencing an abandonment of the contract, irrespective of any peculiar stipulation as to time.

Fourth. It would be hard and unjust to enforce specific performance.

Fifth. The fact that the plaintiffs gratuitously paid taxes upon the property to which they had no pretense of title, and which taxes were imposed by the sovereign power of the state, through the board of supervisors of the county, will not be considered as an estoppel on the part of these defendants, a municipal corporation, no party thereto.

The referee denied said motion, and the defendants' counsel excepted.

The referee found the facts in favor of the plaintiffs, that the delay was by mutual consent, and not the fault

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of the plaintiffs, and a decree was entered for specific performance by the defendants.

From this judgment or decree the defendants appealed.

Rich'd O'Gorman, for the appellants. I. The motion to dismiss the complaint should have been granted. 1. The only contract, express or implied, between Messrs. King & Brush and the defendants, was that upon the payment of fifteen per cent of the purchase price on the first day of May, 1852, and the execution and delivery of a bond and mortgage for the remainder, a conveyance of the premises should be delivered. King & Brush failed and neglected to pay the fifteen per cent, or to make the bond and mortgage, although it appears that the deed was drawn, executed, and ready to be delivered. It is an elementary rule that he who would enforce specific performance of an agreement must either show complete performance, or due tender of performance on his part, having the ability to perform. By their failure to perform, King & Brush were in default, and incompetent to enforce specific performance, and their assignment to the plaintiffs confers no greater rights than they possessed. 2. No right of action can be based upon any alleged agreement subsequently (in December, 1852) made with the plaintiff, to waive the default of Messrs. King & Brush, and further extend indefinitely the time for the payment of the fifteen per cent. Such an agreement on the part of the comptroller amounts to a resale of the premises to the plaintiffs, and is entirely "*ultra vires*" and void. (*Fry on Specific Performance*, 216, note 1.) It was beyond his power to extend the time for completing the transaction, and his promise, therefore, cannot bind the corporation. (*People v. Stout*, 23 Barb. 349. *Altemus v. The Mayor*, 6 Duer, 446. *McSpedon v. The Mayor*, 15 How. 462. *Brady v. The Mayor*, 2 Bosw. 173. *Farmers' Loan and Trust Co. v. The Mayor*, 4 id. 80. 27 How. 44.) 3. *There was no tender of performance at any*

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time. A tender of money, but not of the mortgages required by the terms of sale, is alleged to have been made on the fifteenth of August, 1858, more than six years after the day upon which King & Brush were to perform (May 1, 1852.) 4. The time of performance is of the *essence* of the contract, arising under the terms of sale. "The time is originally of the essence of the contract, *in the view of a court of equity*, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract." (*Fry on Specific Performance*, p. 413. *Hipwell v. Knight*, 1 *Younge and Collyer*, Ex. 415. *Reed v. Chambers*, 6 *Gill & J.* 490. *Wells v. Smith*, 2 *Edwards' Ch. Rep.* 78, *aff'd.* 1 *Paige*, 22.) A part of the stipulation was that security for payment should be given within a specified time, and the regular payment of interest thus assured; against the failure to perform this act the plaintiff will not be relieved. (*Doar v. Gibbs*, 1 *Bailey's Ch. R.* 371.) 5. Even if time was not originally of the essence of the contract, the long continued neglect of the plaintiffs and their assignors, to attempt or offer performance, constitutes *laches* which disentitles them to the aid of the court. (*Fry on Specific Performance*, p. 412, sections 708, 709, 711, and note 3, p. 415; also section 732, p. 423, and section 741. *Lloyd v. Collett*, 4 *Bro. C. C.* 469. *Benedict v. Lynch*, 1 *John. Ch. Rep.* 370. 4 *Sandf.* 374, 426. *McWilliams v. Long*, 32 *Barb.* 194.) 6. To enforce specific performance would be harsh and unjust. (*Fry on Specific Performance*, p. 181, sec. 251.) 7. The statute of limitations is a bar to the maintenance of the action. The cause of action for the specific performance of a contract to convey land, accrues whenever the plaintiff could have filed a bill for the relief sought; an equitable action for specific performance will lie without any demand before the suit; demand before suit brought is important only in respect to the costs in the action, and has no bearing upon the rights of

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the parties. The statute of limitations against such an action, therefore, runs without reference to demand. (*Bruce v. Tilson*, 25 N. Y. Rep. 194.) It follows that the alleged cause of action accrued May 1, 1852, twelve years before the action was commenced. It also appears that, "in the latter part of 1854," upon the plaintiffs applying for a conveyance of the property, they were informed by Mr. Cady, the comptroller's representative, that he "did not feel willing to close the business"—i. e., he declined to deliver the deed—and from that time the plaintiffs are chargeable with notice that their right was denied.

II. The testimony that the property was assessed in the name of the plaintiffs, and taxes paid by them, was incompetent, and exception thereto properly taken. The taxes are laid, not by the defendants or their officers, but by independent officers, exercising functions conferred by various statutes, who are not controlled by the defendants. No estoppel therefore can arise from their acts.

H. H. Anderson, for the respondents. I. The fact of sale is admitted, and no reason appears in the case, or has been suggested, which a court of equity can regard, why the sale made by the defendants should be set aside; for such would be the effect of a decision in favor of the defendants. The sale was regularly made at auction; it is not pretended that the price was inadequate, nor that there was any fraud in the transaction, but the contrary affirmatively appears. The ten per cent required by the terms of sale, and the auctioneer's fees, were duly paid, and the money so paid was deposited in the city treasury. Fifteen per cent was payable on the first day of May thereafter, when the deeds were to be ready for delivery. It appears from the evidence that the deeds for this property were not ready then, as Mr. Lawrence, the clerk to the comptroller, produced the only deed which was prepared, and this was made to the plaintiffs, after the pur-

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chase bid was assigned to them, with the consent of the comptroller, and this deed was acknowledged December 17th. It bears the approval of the counsel to the corporation, Henry E. Davies, and this approval is abundant evidence that neither the purchaser nor the plaintiffs were then considered in default. No charge of default can be made against the purchaser by reason of the non-payment of the fifteen per cent on the first of May, as the deed was not then ready for delivery, and had not been made out, and it is evident that time was not made the essence of the contract. No suggestion to that effect was ever made by the defendants, and the finding of the referee that the delay in completion of the purchase was by mutual consent of the plaintiffs and defendants, is abundantly sustained by the proofs, and will not be disturbed by this court.

It is always sufficient, even for a party who has been guilty of laches, to show that his laches have arisen from a reasonable cause, or have been acquiesced in by the other party. But no laches are chargeable when, as in this case, mutual consent is shown. (*Williston v. Williston*, 41 Barb. 635. *Waters v. Travis*, 9 Johns. 450, 466. *Viele v. Troy and Boston R. R. Co.*, 21 Barb. 381. *D'Arras v. Keyser*, 26 Penn. 249.)

II. The objection that the action was not commenced within six years after cause arose is untenable. The finding of the referee is that the time for performance of the contract was extended by mutual consent until August, 1858. Then, for the first time, is a refusal by either party hinted at. It appears from the proof, that from that time the plaintiffs were engaged in endeavoring to secure their rights without resort to suit, but suit was commenced in July, 1864, within six years from the time when a cause of action arose by the refusal of the comptroller to deliver the deed. Until then the parties had been negotiating together, both recognizing their mutual obligation to each other.

Miller v. The Mayor &c. of New York.

III. The defendants sustain no injury from a decree of specific performance, while the refusal to perform would work an injury to the plaintiffs, and this is a sufficient reason in equity to sustain the decree. Interest is paid the defendants, and they suffer no wrong or hardship, as they receive full compensation for the delay. The plaintiffs paid their money in good faith, the property was regarded as sold, so much so that taxes were assessed upon these lots, as they are not on corporation property, and for several years such taxes were paid by the plaintiffs. These moneys will be lost if the sale is set aside, and no equitable ground has been suggested for such action.

By the Court, SUTHERLAND, J. I find no reasonable ground for saying that the referee's findings of fact were not authorized by the evidence, or that his findings of fact did not authorize his conclusion of law.

If King & Brush, the original purchasers at the auction sale, omitted to tender payment on the 1st of May, 1852, of the 15 per cent, and their bond and mortgage for the 75 per cent of the purchase money, their fault or default in not doing so, must be deemed to have been waived by the defendants; for I cannot doubt that the defendants were bound by the arrangement which the plaintiffs made with the comptroller, in December following, as to the execution and delivery of the deed to the plaintiffs as the assignees of King & Brush. Relying on this arrangement, the plaintiffs paid King & Brush the ten per cent and the auctioneer's fees.

The delay which subsequently took place, until in August, 1858, when the plaintiffs tendered the full amount of the purchase money unpaid, with interest, the referee found took place by mutual consent of the parties, from time to time, and was not the fault of the plaintiffs. This finding is abundantly supported by the evidence, if the

Seabury v. Brewer.

defendants should be considered as bound by the action of the comptroller or comptrollers in the matter.

I do not see upon what ground it can be reasonably claimed that the defendants were not bound by the action of the comptroller or comptrollers in the matter of postponing the delivery of the deed.

I think the statute of limitations did not commence running until the refusal of the comptroller to deliver the deed, in August, 1858.

I think the judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, January 4, 1869. *Clerke, Sutherland and Geo. G. Barnard, Justices.*]

GEORGE SEABURY and THOMAS L. WING, executors, and
ELIZA BREWER, executrix, &c. *vs.* EMILY H. BREWER.

A testator, by his will devised and directed as follows: "I wish my personal and real estate to be appropriated equally to the benefit of my wife Emily, and of my [two] children," (naming them.) *Held* that the persons named took *per capita*, and not *per stirpes*, and therefore each was entitled to one third of the residue of the estate after the dower interest of the widow was satisfied.

THIS is a controversy submitted without action, pursuant to the provisions of section 372 of the Code of Procedure.

James M. Brewer, late of the city of Troy, died on the 5th day of January, 1869, leaving him surviving his widow, the defendant, Emily H. Brewer, his son, Seabury Doane Brewer, and his daughter, Florence Kipp Brewer. He left real and personal property to the amount of about \$15,000. He also left a will, of which the following is a copy:

 Seabury v. Brewer.

“Troy, June 23, 1865.

In case of my death, I hereby constitute and appoint the Rev. Geo. Seabury, of Columbus, Ohio; Thomas L. Wing, of Poughkeepsie, New York, and Eliza Brewer, of Poughkeepsie, New York, my executors, and guardians of my children.

I wish my personal and real estate to be appropriated equally to the benefit of my wife Emily H. Brewer, and of my children, Seabury Doane Brewer and Florence Kipp Brewer.

The following insurances are on my life, viz: \$5000 in Connecticut Life, for my children; \$5000 in Connecticut Life, for my wife; \$5000 in Traveler's Life, for my children; \$1000 in Widows and Orphans' Life, for my wife.

I wish the guardians of my children to see that they are brought up in the Protestant Episcopal church, or in other words, the Church of England; and I wish them to be taught to despise that curse of our country, abolitionism.

In witness whereof I place my hand and seal.

JAMES M. BREWER. [L. S.]

Witnesses:

Zena C. Green, Troy, N. Y.	U. S.
R. F. Watson, Troy, N. Y."	\$10 stamp, canceled.

The said will was admitted to probate by the surrogate of the county of Rensselaer, on the 20th day of January, 1869, and letters testamentary were on the same day issued to the said George Seabury, Thomas L. Wing and Eliza Brewer, plaintiffs above named, who duly qualified to act as executors and executrix of the said will, and entered upon the discharge of their duties as such.

E. L. Fursman, for the plaintiffs.

J. C. Greene, for the defendant.

Seabury v. Brewer.

By the Court, INGALLS, J. The only question presented for consideration arises upon the following provision of said will: "I wish my personal and real estate to be appropriated equally to the benefit of my wife, Emily H. Brewer, and of my children, Seabury Doane Brewer and Florence Kipp Brewer." It is contended by the counsel for the defendant, Emily H. Brewer, that she is entitled, under the foregoing provision of said will, after her dower is assigned, to one half of the residue of the property, real and personal, of her said husband.

The counsel for the plaintiffs, the executors, insist that the said Emily H. Brewer is only entitled, after the assignment of her dower, to one third of said estate.

We regard the law too well settled to admit of a reasonable doubt, in regard to the construction which this provision of said will should receive, in determining the rights of the respective parties in the division of said estate. It is very clear that the parties named take *per capita* and not *per stirpes*, and therefore each is entitled to one third of the residue of the estate after the dower interest of the widow, Emily H. Brewer, is satisfied. In *Myres v. Myres*, (23 How. Pr. Rep. 410,) Justice Bockes, in a well reasoned opinion, has fully and satisfactorily discussed this question. (See also *Collins v. Hoxie*, 9 Paige, 89; *Bunner v. Storm*, 1 Sandf. Ch. 358; *Murphy v. Harvey*, 4 Edw. Ch. 131.) There is not an expression contained in the will which is not in harmony with this construction, or which indicates that the testator intended to make any other disposition of his property.

Judgment should be entered declaring the rights of the parties in accordance with the foregoing, and pursuant to sections 372, 373 and 374 of the Code.

[ALBANY GENERAL TERM, March 1, 1869. *Miller, Ingalls and Hogeboom*, Justices.]

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A

ACCORD AND SATISFACTION.

See EQUITABLE DEFENSE.

ACCOUNT

See EXECUTORS AND ADMINISTRATORS,
4, 5, 6, 7.
PARTNERSHIP, 8.

ACTION.

1. No action will lie to recover of a county, or of a municipal corporation money collected, or received upon or for a tax based upon an erroneous assessment. *The Geneva Valley National Bank v. The Board of Supervisors of Livingston County*, 228
2. If assessors have acquired no jurisdiction, of the person the case of *Mygatt v. The Supervisors of Chango* (11 N. Y. Rep. 568) still gives an action against them; but, when they have such jurisdiction, no suit can be maintained against any person for the imposition or collection of a tax erroneously imposed. *ib*
3. Although the law is opposed to circuity of action, that is, opposed to any attempt to obtain indirectly, by means of a subsequent action, a result which may be reached in an action already commenced; yet where it is not known, at the time the first action is commenced, that the defendants have possession of

other property of the plaintiff than that sought to be recovered in that action, a second action may be brought, for such additional property. *Risley v. Squire*, 280

4. Money having been placed in the hands of an individual as a mere depositary, for the use of another, may be recovered by the latter, whether it was paid to the depositary on a legal or an illegal contract. The liability of the depositary arises upon the receipt of the money, and is entirely separate from, and independent of, any illegal contract. *Woodworth v. Bennett*, 861
5. L. having been convicted of a felony, filed exceptions and sued out a certiorari, and being at large on bail, he left the state and failed to appear to receive sentence. The defendant, who was one of his bail, thereupon executed a writing offering a reward of \$250 to any person who should take and safely lodge L. in the Elmira jail, and delivered the same to the plaintiff, who was sheriff of Chemung county. The latter pursued L. to Illinois, and there, under a requisition from the governor of this state, arrested L. and lodged him in the jail at Elmira. *Held* that an action would lie against the defendant, to recover the reward offered by him. *Gregg v. Pierce*, 887
6. *Held, also*, that the fact that the plaintiff was sheriff, or that the requisition upon the governor of Illinois described him as sheriff, added nothing to his authority under the requisition, and that he must be

deemed to have made the arrest as a private citizen, merely, and not as sheriff. *ib*

7. And that the statute prohibiting sheriffs or other officers to whom fees are allowed by law for any service, from taking or receiving any other or greater fee or reward, for services rendered, than such as are allowed by law, when construed according to its spirit and meaning, did not affect the plaintiff's right to recover such reward. *ib*

See ARBITRATION AND AWARD, 8.
DEBTOR AND CREDITOR, 6.
DECEIT.
HUSBAND AND WIFE, 7.
LEASE, 2.
PROMISSORY NOTES, 8.
RAILROAD COMPANIES, 4.

ADULTERY.

See DIVORCE.

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See APPEAL, 6.
PRACTICE, 10, 11, 12, 13.

AGREEMENT.

1. The consignee to sell, of corn then on board a vessel, on selling 10,000 bushels thereof to G., March 18, 1867, gave a receipt for the price, in which he agreed to store the corn free, and deliver it in store free of all charges (except that he was not to insure it) until the opening of navigation. On the 10th of April, 1867, the corn being still in the vessel, G. sold to the plaintiffs 2000 bushels thereof and received payment. It was mentioned in the bill of sale "Insurance 7 days," and that the plaintiffs were to "pay insurance after the 18th, \$2000." The corn was at that time insured against loss or damage on board the vessel, to the amount of \$2400, until May 1, 1867. G. on selling, gave an order on the vessel to deliver the corn "free of storage until the opening of canal naviga-

tion," which order was accepted by the master. On the 19th of April the corn was, by the direction of the consignee, and without notice to the plaintiffs, transferred to an elevator, where it was destroyed by fire, without any insurance upon it while there. The elevator was a fit and proper place of storage. *Held* 1. That as to the storing of the corn there was no breach of the agreement; the agreement not specifying where it was to be stored, and it having been stored in a suitable place. 2. That as to the delivery of the corn, the accidental destruction of it by fire was a legal excuse for its non-delivery. 3. That it was not the duty of the defendant, as owner of the vessel, to notify the plaintiffs of the intended transfer of the corn to the elevator; the custom on that subject not applying to property which has been stored on a vessel through the winter. 4. That the rights of the parties depended upon the contract, which was to store free, and deliver in store free of charges, and the action being upon the contract it could not be maintained without proving a breach. *Curtis v. Prinderville*, 186

2. Where one party is entitled to rescind an agreement, on account of the failure of the other party to perform it, he cannot rescind it in part, and affirm it as to the residue; but must affirm or disaffirm it entirely. If he affirms it in part, his duty to continue its performance remains while he so affirms it, leaving him as a means of indemnity for the defective or imperfect performance of the other party, an action for damages only, and not a diversion of a portion of the consideration agreed to be supplied by the party not in fault. *Day v. The New York Central Railroad Company*, 250
3. The plaintiff, by a written agreement with the defendant, agreed to erect and maintain cattle yards and pens, on his own premises, for receiving, keeping and shipping on the defendant's cars such cattle, sheep, swine, &c., as should be brought over the Great Western Railway, and to convey to the defendant the land required for the construction of the necessary railway upon it for the convenient transaction of that business,

upon the consideration of the defendant's verbal agreement that it would lay down a track on the land conveyed, and that the plaintiff should permanently have the transaction of that entire business. The agreement was substantially performed by the plaintiff by conveying the land to the defendant and the erection of cattle yards and pens. Subsequently, the defendant, on the ground that the plaintiff did not complete and maintain the yards and pens in a proper and suitable condition, diverted a portion of the business stipulated for, to yards and pens erected by itself, permitting the plaintiff to receive the residue of such business. *Held* 1. That the defendant could not, while it permitted the plaintiff to carry on the business in part, which it stipulated to supply him with, justify itself in withholding the residue from him. 2. That in doing that, the defendant violated the agreement on its part, which justified the plaintiff in refusing to receive the portion he was still permitted to have. 3. That there was, therefore, a failure on the part of the defendant to perform the agreement which constituted the consideration for which the plaintiff conveyed the land and erected the cattle yards and pens. And such failure entitled him to recover the value of what the defendant had received from him, and for which it had agreed to supply him with the business specified. 4. That the defendant having obligated itself to compensate the plaintiff for the facilities he afforded the defendant in the transaction of its business in no other way than by the business it agreed to supply to him, and the agreement for that purpose being void, because not in writing, no action could be sustained by the plaintiff for depriving him of that business. 5. That a charge by which the jury were directed that they might allow the plaintiff damages for the diminished value of the use of the cattle yards and pens, occasioned by the refusal of the defendant to perform the contract requiring the stock to be taken to them, was erroneous. 6. That the recovery should have been limited to such damages as would compensate the plaintiff for what the defendant had received from him under the contract, which would include no

part of the losses sustained by him on account of the defendant's omission to furnish the business it agreed to supply him with. *ib.*

4. Where the owner of land agrees to pay the occupant, for working the same on shares, the value of a certain portion of the crops and produce, the parties are tenants in common of the crops, &c. In such a case the occupant does not become a tenant, and the agreement between him and the owner is not to be construed as a lease. *Wilber v. Sisson*, 258
5. Where the agreement is of such a nature as to constitute a tenancy, as distinguished from an occupancy to work the land on shares, then the products become the property of the tenant, and he can use, sell or dispose of them as he may choose. *ib.*
6. G. agreed with C. to work the dairy and land of the latter for one year, from the 1st of March, 1865, upon the terms mentioned in a written agreement between them. For the use of the farm and dairy he was to deliver to C. 9600 lbs. of good merchantable cheese, made at a specified cheese factory. The agreement contained no words by which the premises and the cows were leased and demised to G. nor any agreement on the part of G., to pay any thing for their use, by way of rent, but began by declaring that G. agreed "to work" the dairy and land of C. on the "following terms." It then stated as a part of such terms, that C. should furnish good dairy cows to the number of fifty; that G. should work the land, and that it should be occupied by the cows. The cows were to be at the risk of G. during the year, and if any of them should be injured or die, he was to pay the damages occasioned by such injury, and to replace such as should die. He was to work the land in a good, faithful, farmerlike manner, and raise all the grain, grass and corn that he could, with good faithful tillage of the land. He was to provide the seed-corn and deliver half the crop raised from it to C. The crops were to be fed to the cows on the farm, his own team and his family, and he was prohibited from selling any part of the crops without C.'s consent. Whatever hay or other

deemed to have made the arrest as a private citizen, merely, and not as sheriff. *ib*

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fodder was left in the spring, was to be the property of C., and if it fell short, during the winter, C. was to supply the deficiency. *Held* that this was not an agreement for the leasing of the premises to G. constituting a tenancy, but was an employment of the latter to work the land and carry on the dairy upon shares. *ib*

7. The agreement mentioned the cheese which C. was to receive as *his* part of the cheese, and this the occupant agreed to deliver to him, free of charge, at whatever place it should be contracted to be delivered at; and it was provided that C.'s part of the cheese should commence to be made the 15th of May, 1865; that he should have a certain number of pounds for his part; that G. should pay the cheese factory for making C.'s part of the cheese; and that all the rest of the cheese and butter should be G.'s. *Held* that these stipulations, taken together, showed an intention on the part of the parties that the cheese should be manufactured from the milk of the dairy, and that the quantity to be delivered to C. was to be his part or share of the aggregate products. And that, so construed, they harmonized with the other provisions and stipulations, indicating that the farm and dairy were to be carried on by G. on shares. *ib*

8. *Held, also*, that the agreement, by providing that G. should own only the residue of the cheese, in effect excluded him from owning any part of C.'s share. That it was competent for the parties so to agree, and they having done so, it necessarily left C. the owner of all that was produced by the dairy, which it was not provided that G. should have. *ib*

9. The plaintiff agreed to keep for the defendant, a sow and six pigs, from the 25th of May, to the 1st of September, 1865, for which he was to be paid two pigs and \$5. The plaintiff, after having kept the animals some time, asked the defendant which of the pigs he should take. The defendant said there was no choice except &c., and that the plaintiff might take which he had a mind to. Three or four weeks after this the plaintiff, without notice to the defendant, selected two of the pigs

and put them by themselves; and the defendant afterwards took them away without the plaintiff's consent. *Held* that the plaintiff had no right of action against the defendant for the taking of the two pigs; as he could not, under the agreement, claim pay for the keeping of the sow and pigs, until the term for which they were to be kept had expired, and the time for a choice of pigs had not arrived, when the action was brought. And that there was no such setting apart of those two pigs for the plaintiff, as amounted to a making of them over, as so much payment in advance. *Hovey v. Carpenter*, 382

10. The defendant, being the owner of a farm, entered into an agreement with the plaintiff, by which it was contemplated and intended that the latter should take and cultivate such farm, and receive and maintain upon it certain live stock, for their joint and mutual profit and advantage. As his share of the joint adventure the defendant furnished the farm, the live stock, and certain parts of the seed grain and grass seed, and the plaintiff was to supply the residue and perform the labor, and devote the care required for carrying on the farm, and providing for and taking care of the stock and its increase; to deliver to the defendant one half of all the products of the farm; and to leave upon the farm, at the expiration of his term, the same amount of live stock he received from the owner; but there was no express provision made as to the *hay* which should be raised on the farm. *Held* that the enterprise, though not a partnership, was in the nature of one; the leading object being to place the plaintiff in a situation where he could work the farm on shares, and to secure the joint benefit and profit of the parties. That the plaintiff therefore had the right to feed out the hay, on the farm, to the stock specified in the agreement to be kept on the farm; and if there was any excess of hay remaining, after he had performed all his obligations under the agreement, it belonged to him, and not to the defendant. *Burdick v. Washburn*, 397

11. And the plaintiff having been, before the expiration of the term dis-

possessed by the defendant, on the alleged ground that the former was, in violation of the agreement, feeding his own horses on hay cut upon the farm; *Held* that the defendant was liable to the plaintiff for the value of the excess of hay beyond what was required to feed the stock mentioned in the agreement. *ib*

See ARBITRATION AND AWARD.
DEBTOR AND CREDITOR, 5.
EQUITABLE DEFENSE.
FRAUDS, STATUTE OF, 3, 5, 6.
PRINCIPAL AND AGENT, 8.

AMENDMENTS.

1. Independent of the Code, this court has the power on motion at special term, at any time before verdict, to allow amendments to pleadings, by permitting the insertion of a new cause of action or a new defense. *Ford v. Ford*, 525
2. But the power of the court to allow such an amendment *during the trial of a cause* is quite a different thing. Such a power did not exist before the Code, nor has it been conferred by that statute, *it seems*. *ib*
3. The court has no power, *on the trial of a cause*, to allow the amendment of a pleading by inserting a new cause of action, or a new defense. And if such power is not possessed by the court, on the trial, it is not possessed by a referee. If, on the trial before a referee, such an amendment is desired, it can only be obtained by suspending the trial, or hearing, and applying, on notice, to the special term. *ib*
4. After the trial of an action has been commenced, the power of courts over the amendment of the pleadings is of a very limited and restricted character. But at any time before the trial has begun, the pleadings may, upon special motion, be changed and amended, in all respects. *Bigelow v. Dunn*, 570
5. This power is possessed by courts of justices of the peace, in common with courts of record. They may therefore allow a plaintiff, in that stage of the cause, to amend his complaint by changing it from one

form of action to another; as from an action for fraudulent representations to an action for a breach of warranty. *ib*

See REFEREE, 1, 2, 3.

ANSWER.

1. Matter set up as a separate and distinct defense, in an answer, must be viewed as a pleading, under section 152 of the Code. Sham and irrelevant answers and defenses may be stricken out; but under this section, neither an entire answer or defense, nor a part of an answer or defense, can be stricken out as *redundant*. *Fannacht v. Stahn*, 650
2. Under section 160 of the Code, irrelevant or redundant matter in a pleading may be stricken out; but this section does not authorize an *entire* answer, or an entire defense in an answer, to be stricken out as irrelevant or redundant. By irrelevant or redundant matter in this section, is meant matter impertinently or unnecessarily stated, in setting forth *the cause of action in the complaint, or the defense, or a defense, in the answer*. *ib*
3. Although an answer or defense be *frivolous*, it does not follow that it is, or must be, *irrelevant*, also. *ib*
4. If matters set up in an answer are *relevant* to the cause of action stated in the complaint; that is, if they relate or pertain to it; they cannot be deemed irrelevant. *ib*

APPEAL.

1. An order of a county court, dismissing an appeal from a justice's judgment, on the ground that it was not brought in time, is a final determination of the rights of the parties, in the action, and is therefore to be deemed a judgment, within the meaning of section 245 of the Code. *Pearson v. Lovejoy*, 407
2. Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored. *ib*

3. The personal notice of a judgment, required by section 858 of the Code, in order to limit the time to appeal, means a personal notice in writing from the party who has obtained the judgment, and not a notice incidentally derived from a third person, or in some other way. *ib.*
4. The statute must be held to give the right of appeal at any time within twenty days after the party shall receive written notice from the party recovering the judgment. *ib.*
5. A general appearance by the respondent, in the appellate court, and noticing the appeal for argument, are positive acts of submission to that court, and amount to a waiver of the right to have the appeal dismissed on the ground that it was not made in time. *ib.*
6. Objections to the preliminary affidavit, in supplementary proceedings, cannot be raised on appeal from the order appointing a receiver, where there is nothing in the papers to show that such objections were made before the county judge, or that he made any decision relating to them. The proper course is to move to vacate the original order. *Union Bank of Troy v. Sargeant*, 422
7. The objection that the execution appears to have been issued after the expiration of five years from the entry of the judgment, cannot be raised on such appeal. If the execution was improperly issued, the defendant should have applied to the court to set it aside for irregularity. *ib.*
8. The personal notice of a judgment, required by section 858 of the Code, in order to limit the time to appeal, means a personal notice in writing from the party who has obtained the judgment, and not a notice incidentally derived from a third person, or in some other way. *ib.*
2. An award cannot be impeached except for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the facts. On these grounds courts of equity interfere to set aside awards, upon the same principles, and for the same reasons which justify their interference in regard to other matters, where there is no adequate remedy at law. Nothing short of this will answer as a ground of interference, to set aside the determination of these tribunals. *ib.*
3. Corruption, partiality, or gross misbehavior, are all charges of a personal nature against the arbitrator, and relate only to his corrupt intentions, or unfair and improper conduct in the trial and determination of the matter before him. *ib.*
4. An allegation, in a complaint, that an award "is partial and unjust" in certain particulars specified, is no charge that the arbitrator was guilty of any intentional partiality or injustice in making it; nor does it imply, even, any such imputation upon the arbitrator. *ib.*
5. The merits of an award cannot be reinvestigated, and where there is no charge of corruption or misconduct in the arbitrators, nothing *dehors* the award can be pleaded or given in evidence to invalidate it, however unreasonable or unjust it may be. *ib.*

See COUNTY COURT.
STAY OF PROCEEDINGS.

ARBITRATION AND AWARD.

1. Where it is obvious from the complaint and the papers referred to and made a part thereof, in an action to set aside an award and for other relief, that the plaintiff has no cause of action, and no title to any portion of the relief demanded, unless he can succeed in getting rid of the award; and it appears plainly that the complaint does not state a case for setting aside the award, the court may properly refuse to hear the evidence offered and order the complaint to be dismissed. It is not bound, and cannot be required, to try mere barren issues, which can be productive of no fruit, in the end; and no exception will lie, for a refusal to hear evidence upon, or to try such issues. *Perkins v. Giles*, 842
2. Where no mistake of fact, in an award, was alleged in the complaint, nor was it averred, in terms, that the arbitrator had made a palpable mistake in any matter of law; but it was averred that "said award is contrary to the lawful rights of the parties in real estate," specifying the error to be in a certain holding of the arbitrator; *Held* that this was rather in the nature of an objection and exception to an erroneous ruling

or judgment in a matter of legal construction, than an allegation of a palpable mistake in such matter. *ib*

7. Mere *uncertainty*, in an award, forms no proper ground for the interference of a court of equity, to set it aside. If it is so uncertain that it cannot be executed, or enforced at law, it is void, and no resort to a court of equity is necessary, either for prevention or relief. *ib*

8. The defendant, a corporation formed under and pursuant to chapter 194 of the laws of 1846, (*Laws of 1846, p. 222*), erected a dam across a river, which abutted upon the lands of W., and not being able to obtain by voluntary donation or purchase from him the land and water privileges it required, nor to agree with him as to the compensation to be paid him for the injury caused by the dam, entered into an agreement in writing, with him, by which the parties, pursuant to sections 9 and 10 of said act, appointed three persons impartially to estimate and determine the price to be paid by the defendant to W. for the said real estate, and for the injury caused by the dam; the said persons being declared to have all the powers and to be subject to all the duties, in the premises, which in and by said act were conferred and enjoined. The arbitrators met and heard W.'s evidence, but before the cause was finally submitted to them, the defendant served upon them and upon W. notices under seal, revoking the powers of the arbitrators; whereupon they refused to pass upon the matters submitted, or to make any report. *Held* that the act of the defendant in making and serving the notices of revocation was a breach of the agreement to submit; and that those acts having induced the three persons named to refuse to make a report, the executor of W. could recover of the defendant all the damages he had sustained in consequence of such refusal, such as the expenses incurred by him in employing counsel, procuring the attendance of witnesses, &c. *Miller v. The President, &c. of the Junction Canal Co.*, 590

9. There is no valid objection to regarding persons appointed by parties

pursuant to the above statute as arbitrators, although they are not designated in the act either as appraisers, or referees, or arbitrators; and it seems they should be deemed arbitrators, and therefore authorized to hear evidence. *ib*

ASSAULT AND BATTERY.

See EVIDENCE, 1.
HUSBAND AND WIFE, 9.

ASSESSORS AND ASSESSMENT.

Where assessors, having jurisdiction of a bank, and of the subject matter, the description, amount and value of its property liable to taxation, assess such bank at the full amount of its capital, they, in so doing, act within their jurisdiction, and if they err, the error is a judicial one, which can be reviewed upon certiorari, but clearly cannot be reviewed in a collateral suit or proceeding. *The Genesee Valley National Bank v. The Board of Supervisors of Livingston County*, 228

See ACTION, 2.
TAXES AND TAXATION

ASSIGNMENT.

See JUDGMENT.

B

BANKERS.

See PARTNERSHIP, 2.

BANKS.

1. The act of congress, approved February 25, 1863, entitled "An act to provide a national currency," does not authorize the directors of a bank incorporated under its provisions and in conformity with the act of the legislature of this state, passed March 9, 1865, entitled "An act enabling the banks of this state to become associations for the purpose of banking, under the laws of the

United States," to create, by a by-law, a lien in favor of the bank on stock held by stockholders, for the security of debts due by them to the bank. *Rosenback v. The Salt Springs National Bank*, 495

2. A by-law declaring that no transfer of the stock of the association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise, if not void because it provides for a forfeiture of stock, is void because, without express authority, it attempts to impose a lien upon its stock. *ib*

3. The power to declare a lien upon stock, by means of a by-law, is not expressly conferred upon the national banking associations, by the act of congress; nor has it been incidentally or impliedly conferred upon them. Yet the lien may exist, if provided for in the articles of association. *ib*

See CORPORATION 7, 8.
PRACTICE, 6, 7.

BOUNTIES.

See MILITARY BOUNTIES.

BROKERS.

See PRINCIPAL AND AGENT, 1.

C

CARRIERS.

1. *It seems* that the extraordinary liability of the proprietors of a steamboat, as common carriers of freight, ceases when the goods transported by them are landed on the wharf, at the place of destination, and are ready for delivery; that thenceforth they are liable only for ordinary care; and that the law does not require from that class of carriers a notice to consignees of the arrival of the goods carried. *Ely v. The New Haven Steamboat Company*, 207

2. But the evidence may establish a course of business between the parties with respect to the mode of delivering goods, which will govern the liability of the carriers in any particular case. *ib*

3. The plaintiffs had been accustomed, for many years, to receive goods, at New York by the defendant's steamboats, as often as once a week. Such boats arrived in New York, each day, at stated hours, morning and evening. Upon the arrival of the boat, each trip, the goods on board were landed on the defendant's wharf, and placed in charge of trustworthy persons employed by them to take care of and deliver the goods to the consignees, and collect the freight, and the boat then started upon her return trip. The plaintiffs always sent their own carman to the wharf, for their goods, soon after the arrival of the boat, and there received them from the persons so employed by the defendants. *Held* that a delivery of goods consigned to the plaintiffs, upon the wharf, in the usual way, and the lapse of a reasonable time for the plaintiffs to take away or reject the goods terminated the extraordinary liability of the defendants as common carriers, for the reason that their contract had been performed by a carriage of the goods safely to the point of ultimate destination, and a delivery thereof at the appointed place of delivery. That after those acts, the defendants must be deemed to have renounced their liability as common carriers and assumed that of wharfingers, and they could be held liable only for actual negligence. *ib*

4. Accordingly, where goods consigned to the plaintiffs, after being transported from New Haven to New York upon a boat of the defendants, were landed upon the wharf, at the latter place, early in the morning of July 4th, where they remained, without being called for by the plaintiffs, until about two o'clock A. M. of July 5, when they were destroyed by an accidental fire; *Held* that the defendants were not liable for the value of the goods. *ib*

5. Where the contract, in terms, or as affected by the usage of trade, is to deliver the goods at the wharf, no-

tice to the consignee, of their arrival, is not necessary. It is not itself an act of delivery, or equivalent or even akin to it. It is a substitute for it, arbitrarily created. *ib*
uu

6. If usage requires notice to be given to the consignee, the fact that the store of the latter was closed the whole of the day on which the goods arrived, and until after they had been destroyed, will excuse the carriers from giving such notice. They are not bound to go beyond the usage, and seek the consignees elsewhere than at their place of business. *ib*

7. The fact that goods arrive on the 4th of July is immaterial; that not being a holiday in any sense which affects an action brought to enforce the liability of common carriers as such. *ib*

CASES OVERRULED, DISAPPROVED OR DISTINGUISHED.

1. The decision in *Brewer v. Temple* (15 *How. Pr.* 286) overruled. *Anderson v. Hill*, 238

2. The opinions advanced in *Woodruff v. Dickie*, (18 *How. Pr.* 104,) that "a referee is no longer an officer of the court;" that "the court at special term has no more power to grant amendments than the court has on the trial;" and that "a referee has all the powers of a court at special term, to allow amendments," disapproved. *Ford v. Ford*, 525

3. The case of *Allen v. Clark*, (11 *How. Pr. Rep.* 213,) in which it is intimated that in no case can an execution issue, after the death of the defendant therein, without leave of the court, disapproved. *Flanagan v. Tynen*, 587

4. The cases of *Hatch v. Mann*, (15 *Wend.* 44,) and *Harp v. Osgood*, (2 *Hill*, 216,) distinguished from the present. *Gregg v. Pierce*, 887

CHATTEL MORTGAGE.

See LEASE.

COMPLAINT.

1. That a complaint contains two distinct causes of action, which are not separately stated, is not a cause of demurrer specified in section 144 of the Code of Procedure. An error or defect of that kind is to be corrected by motion. *Anderson v. Hill*, 238

2. A complaint which states facts constituting a cause of action for an assault and battery, and also a cause of action for slander, both in the same count, and alleges that the plaintiff was greatly injured in her person and also in her character and feelings, and claims damages generally for a specified sum, is bad on demurrer. *ib*

3. A cause of action for alleged tortious acts of the defendant, as a director and president of a bank in South Carolina, cannot be joined in the same complaint with one for an alleged liability of the defendant as a stockholder under a statute of South Carolina. *Butt v. Cameron*, 642

4. Where such complaint does not show, or state facts sufficient to show, that the plaintiff as a bill-holder was injured or damaged by the alleged acts of malfeasance and misfeasance of the defendant, as a director and as president, &c., it does not state facts sufficient to constitute a cause of action; especially where it does not even state that the plaintiff was the holder of the bills or bank notes, or any of them, when the alleged acts of malfeasance and misfeasance were committed. *ib*

5. A count in a complaint, alleging that the defendant is a stockholder in a bank located in South Carolina, (without stating the amount of his stock,) and that under and by virtue of a law of that state, the defendant is liable to the creditors of said bank, as such stockholder, in the sum of double the amount of his stock, &c., does not state a valid cause of action; the fair inference from the complaint, and from the law as far as stated, being that the liability of the defendant as a stockholder can only be enforced in the courts of South Carolina. *ib*

See ARBITRATION AND AWARD, 1, 4.

CONDITION.

1. Whenever the reversion is granted by the maker of a condition contained in a previous grant, the condition is gone. *Tinkham v. The Erie Railway Company*, 898
2. Where land is conveyed as one piece, subject to a condition, the condition is entire, and a breach of it gives the grantor or his heirs the right to re-enter and take the whole land. The land being a single parcel, the condition on which it was conveyed cannot be apportioned by the grantor. *ib*
3. Where the grantor in a conveyance of land as one parcel, on condition, subsequently conveys a portion of the land to another, the latter conveyance, though void as against the previous grantee, is operative as between the parties to it, destroys the condition in the original deed, and passes the grantor's title, or whatever other rights he had to the land embraced in it, and estops him, or his heirs, from recovering any portion of the land which it purports to convey, for a breach of the condition. *ib*

CONSIGNOR AND CONSIGNEE.

See AGREEMENT, 1.
RAILROAD COMPANIES, 8.

CONSTITUTIONAL LAW.

1. After land taken for a road has been paid for by the public, it cannot be taken from the public and donated to the former owner, without any consideration paid therefor, by an act of the legislature purporting to reduce the width of the highway. *The People ex rel. Failing v. The Commissioners of Highways of the Town of Palatine*, 70
2. When town authorities have taken the land of an individual for the purposes of a public highway, and have paid the proprietor therefor, the right to the easement becomes a vested right in the public; and the public having received the land, and the proprietor the compensation, it becomes a fixed contract between

them, and the provision of the constitution of the United States, declaring "that no state shall pass any law impairing the obligation of contracts" applies. *ib*

3. Where the object and subject of an act of the legislature was to authorize and direct the commissioners of highways of a specified town to reduce a road then of the width of four rods, and for the distance of one mile, to the width of three rods; and the title of the act was, "An act to regulate a road in the town of Palatine, Montgomery county;" *Held* that the subject of the act was not expressed in its title, as required by section 16, of article 3, of the state constitution, and that the act was an attempted fraud upon the public rights, and was null and void. *ib*

See EMINENT DOMAIN.

CONTRACTOR.

See NEGLIGENCE, 2, 3.

CORPORATION.

1. Where the material allegations of a complaint, in an action by the people, against a corporation, for its dissolution, are not denied by the answer, and it thus stands admitted of record that the corporation has forfeited and surrendered its charter and franchise, it would not be a proper exercise of judicial authority to stay the proceedings on the ground of another action pending, in which the corporation is plaintiff, the effect of which would be to prevent the entering of the judgment required by the law to be awarded, and to permit the corporation to continue in the use of its corporate rights. *The People v. The Northern Railroad Company*, 98
2. Where the complaint in such an action alleged that the corporation was insolvent in 1854; (thirteen years before) that it then surrendered its property to its creditors; that it had remained insolvent ever since; had ever since neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and

lawful business; and that another corporation with the same general object had, under the authority of the state, organized and was in actual operation in its place and stead; which facts were not denied in the answer, although the alleged forfeiture was attempted to be excused; *Held* that it was a proper case for a judgment of forfeiture; dissolving the corporation, and restraining defendants who were charged with usurping and attempting to exercise its franchise from further exercising the same, and imposing a fine for its previous unlawful use. *ib*

3. *Held, also*, that the fact of insolvency and suspension of business being admitted in the answer, the law admitted no excuse for the forfeiture, nor was any explanation available. *ib*

4. *Held, further*, that there being no issue in the case to be settled or determined by evidence, and no trial being necessary, beyond an application of the law to the facts, it was the right of the plaintiffs to apply to the court, at special term, for judgment, on the pleadings. *ib*

5. The judgment of forfeiture, given in such a case, may direct the appointment of a receiver of the corporation; notwithstanding section 444 of the Code makes it the duty of the attorney general, immediately after the rendition of such judgment, to institute proceedings for that purpose. That provision of the Code was intended to cover the case where no receiver was appointed in the judgment, but does not prevent the court from rendering complete and perfect relief in and by the judgment itself. *ib*

6. The provisions of the Revised Statutes, entitled, "Of proceedings against corporations, in equity," (2 R. S. 461,) are not repealed or abolished by the act of 1849, "to enforce the responsibility of stockholders in certain banking corporations," &c. (*Laws of 1849, chap. 226.*) *The People v. The Central City Bank*, 412

7. Hence, proceedings may still be instituted, under the Revised Statutes, by the people, through their attorney general, for the dissolution of a

moneyed corporation, and the appointment of a receiver to wind up its affairs. This valuable right was not intended to be in any wise impaired by the act of 1849. So far as this question is concerned, the statutes do not necessarily conflict. *ib*

8. Where two receivers are appointed, of the same bank, under distinct and independent proceedings, and by the terms of their respective appointments each has entire control of all the assets of the bank, they cannot with propriety both act; the title of the one is necessarily exclusive of that of the other, and the question of priority must be determined as a legal right. *ib*

See FOREIGN CORPORATIONS.

COSTS.

1. Where the plaintiffs established at the trial, and were allowed for, a valid and subsisting claim or account against the defendants of over \$400 and nearly \$500, and the defendants established a set-off or counter-claim of over \$400 and within five cents as much as the plaintiffs' demand; both demands being subsisting and independent demands, capable of being prosecuted for as such, affirmatively, and therefore matters of account, within the meaning of section 54 of the Code; *Held* that the plaintiffs, on recovering a judgment for five cents, were entitled to costs; it being a case wherein the Code (*sec. 804, sub. 8*) gives costs to the plaintiff upon a recovery (for any amount) in the actions in which a justice of the peace has no jurisdiction. *Griffen v. Brown*, 428

2. Where, in an action for wrongfully withholding from the plaintiffs the possession of certain land of which they were the owners in fee, and cutting and severing grass from such land, and making it into hay and converting it, the defendant admits the title to the land to be in the plaintiffs as alleged, but claims that he was rightfully in possession of the premises, and had a right to cut and dispose of the hay, under the license and permission of the plaintiffs, by virtue of an executory contract by a third person to purchase the land,

the title to land does not arise; and if the plaintiff recovers a verdict for \$15 only, the defendant is entitled to costs. *Craven (Earl of) v. Price*, 442

3. Where the plaintiff, in an action brought in a justice's court, alleged in his complaint that the defendant wrongfully and unlawfully broke and entered his close and cut timber, &c., upon said premises, and the defendant, by his answer, justified all the acts complained of, on the ground that the locus in quo was a public highway, used and occupied by the public as such; and the justice dismissed the action, on the ground that the title to land came in question; *Held* that if the plaintiff, on continuing his action in the Supreme Court, recovered a verdict for trespasses committed by the defendant outside of the alleged highway, he was entitled to costs, although upon the trial, the defendant succeeded in justifying all his acts committed upon such highway. *Heath v. Bar-mour*, 444

4. In such a case the defendant should, in his answer, carefully describe the highway, and limit his justification to the premises described; and then as to all alleged trespasses other than those within the limits described, he can set up a denial, or license, or any defense he may have, other than title. He should see to it that his answer is not too broad. *ib*

See EXECUTORS AND ADMINISTRATORS, 9.

COUNTY COURT.

1. Where a party, sued in a justice's court by short summons, as a non-resident of the county, omits to appear, and judgment is rendered against him, by default, the county court, on appeal, has no power, upon affidavits tending to excuse the defendant's default, and to show that he was a resident of the county, to reverse the justice's judgment, on the ground of error in fact, in that the defendant should have been sued by long summons. *Tanner v. Marsh*, 488
2. In such a case the provision of section 366 of the Code, which declares

that when it is shown by the affidavits served on the part of the appellant, or otherwise, that manifest injustice has been done, and the default is satisfactorily excused, the county court, in its discretion, may set aside or suspend the judgment, and order a new trial before the same or another justice, should be applied, and not the provision for the correction of errors in fact. *ib*

D

DAMAGES.

In an action to recover damages for the breach of a contract to sell real estate, the proper rule of damages is the amount paid by the purchaser, on executing the contract, together with the difference between the contract price and the actual value of the premises, at the time the contract was to have been performed. *Pringle v. Spaulding*, 17

See AGREEMENT, 3.
JUDGMENT.
WARRANTY, 7.

DEBTOR AND CREDITOR.

1. There is nothing in the statutes of Connecticut relative to insolvent estates, making void transfers by debtors, of their property, when made in view of insolvency, to give the transferee a preference over other creditors of such debtor, and with knowledge on the part of the transferee, which makes such transfers absolutely and *per se* void. They are void only when made for the purpose of enabling the debtor in view of insolvency, to give the person receiving the same a preference over other creditors, and with the knowledge on the part of such person that the transfer was so made. *Hatch v. Brewster*, 277
2. A defendant sued on a note which has been transferred by the holder to a creditor and setting up the defense that such transfer was void, under the statutes, must prove the fraudulent intent. *ib*
3. But even though a fraudulent intent to prefer, be specifically proved,

such defendant cannot avail himself of such a defense. The provisions of the statute were intended for the benefit of the *creditors* of the insolvent. His *debtors* can take no advantage of them. *ib*

4. The purchaser of such a security has a *prima facie* right of recovery, on the production of it; and the maker, when sued thereon, cannot claim a verdict on the ground that it was not affirmatively proved that a former holder, to whom it had been pledged, neglected to demand payment of the pledgor, and to notify the latter of the sale. *ib*
5. An agreement by a creditor to accept a larger sum than that secured by his mortgage, and discharge the lien *before the debt is due by the terms of the mortgage*, is founded upon a valid consideration. *Scott v. Frink*, 583
6. The debtor having paid a part of the sum thus agreed upon, which was accepted by the creditor, under the new agreement, and having refused to pay the balance according to its terms; it was *held* that the creditor, upon tendering satisfaction of the mortgage, was entitled to maintain an action to recover such balance. *ib*

See PAYMENT, 1.

DECEIT.

1. In an action for a *deceit* in the sale of a horse, where the *fraud* is the gist of the action, if there is no evidence of a *scienter*, the action cannot be sustained. *Moore v. Noble*, 425
2. Where the complaint averred that to induce the plaintiff to purchase, the defendant falsely and fraudulently represented the horse to be worth \$120, and guarantied him to be sound in all respects, and free from disease; that he was not sound, and not worth \$120, but was unsound, and had a disease well known to the defendant, at the time of the sale; *Held*, that the complaint was for deceit in the sale, willfully and knowingly perpetrated by the defendant. And that these were substantive averments, on which the action was founded, and it was necessary for the plaintiff to prove them. *ib*
3. *Held, also*, that the defendant having expressly negatived any knowledge by him of the alleged unsoundness, and the plaintiff failing to prove such knowledge, the latter was not entitled to recover in an action for deceit. *ib*

DEED.

1. By the terms of an exception and reservation in a conveyance of land, "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now (then) covered by the mill pond, while necessary for manufacturing the timber on the adjacent lands," were excepted and reserved to the grantor. *Held* that such exception and reservation, being absolute in terms, and unlimited as to the period when the act of removal and manufacture should be exercised, if any time could be fixed by the act of the grantee, or of a judicial tribunal, within which the power of removal and manufacture was to be exercised, it should be in the *future*, upon notice to be given to the grantor, to exercise his power of removal within some time to be named; so as to enable him to obtain the benefit of his reservation. *Gregg v. Birdsall*, 402
2. *Held, also*, that he could not be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture had already elapsed, and therefore his rights were extinguished. *ib*
3. And that so long as the grantor had timber, which he might remove, he had also the right to overflow the lands for such reasonable time as might be necessary for the manufacture of the timber, after removal; which right was not extinguished by delay in its exercise. *ib*

See CONDITION,
HUSBAND AND WIFE, 1, 2.
RAILROAD COMPANIES, 8

DEMURBER.

See COMPLAINT, 1.

DEPOSITARY.

See ACTION, 4.

DILIGENCE.

See PAYMENT, 8.

DIVORCE.

1. When it is established that insanity existed at a certain time, it is presumed to continue, and the *onus* of proving sanity at a subsequent time is upon the party alleging it, or who seeks to hold the person once insane responsible for his acts. *Cook v. Cook*, 180

2. In an action by a husband, against his wife, for a divorce on the ground of adultery, the defendant, without tendering the issue of lunacy or insanity at the time the adultery was committed, pleaded a record adjudicating her a lunatic, some two or three years before the act of adultery, and the answer was proved by the record, which remained unreversed; *Held* that the fact established by the record could not be contradicted; and as a rule of evidence, the presumption, at the time of trial, was that such lunacy continued and existed at the time of the adultery. But that presumption could be rebutted by evidence; and the plaintiff was at liberty to prove that the defendant was sane at the time she committed the adultery. *ib*

3. And the referee, although the issue of insanity at the time the adultery was committed was not raised by the pleadings, having received evidence tending to prove sanity prior to, and at the time of, the adultery, and subsequently, and having found that there was no evidence of the existence of insanity at the time of the adultery; and the evidence upon the question of sanity at that time being satisfactory to the court; *Held* that the plaintiff was entitled to a decree for a divorce, on the ground that the evidence showed the defendant sane at the time the adultery was committed. *ib*

See HUSBAND AND WIFE, 7, 8.

DOMICIL.

See REMOVAL OF CAUSE TO U. S. COURT.

DOWER.

1. Where a wife, after having knowingly and designedly participated in her husband's fraud, by joining with him in conveying his land to a third person, for the purpose of defrauding his creditors, takes from such fraudulent grantee a conveyance of the same premises, the court will not help her to undo the consequences of her acts, one of which was to accept a merger of her dower, in the fee conveyed to her. *Maloney v. Horan*, 29

2. As a wife cannot be endowed of her own lands, the taking of such a conveyance will destroy the claim, if any, which previously existed. *ib*

3. Where the plaintiff, having a claim of dower in premises advertised to be sold by a receiver, attended the sale, and requested the defendant to purchase the property, stating that she had no claim thereon, on the faith of which the defendant became the purchaser, and the plaintiff subsequently took a lease of the premises, from him; *Held* that these circumstances worked a perfect and effectual *estoppel in pais*, against any claim or title of the plaintiff in hostility to that which the defendant acquired at such sale. *Lott, J.*, dissented. *ib*

4. An offer of judgment, in an action for the recovery of dower, for five and a half acres of the land claimed without further description, is too indefinite a foundation for a judgment. A judgment according to the terms of such an offer would be void for uncertainty. Nothing could be delivered to the plaintiff upon an execution issued on such a judgment. *Marble v. Lewis*, 432

5. Such an offer of judgment, so far as the damages are concerned, should be for a sum certain, so that, if accepted, judgment for the amount can be at once entered. *ib*

6. The rule is well settled, in this state, that when lands are alienated

during coverture, by the husband, his widow is entitled to be endowed of such lands, amounting to one third of the value at the time of alienation. Such was the rule before the Revised Statutes, and it was not changed by the revision. *ib*

7. Where the whole premises were alienated during the lifetime of the husband, damages can be recovered only from the time dower was *demanded*; not from the *death of the husband*. *ib*

8. In case of such alienation by the husband, the correct practice is, to ascertain, upon the trial, when the premises were alienated, and in case the value of the premises is greater at the time of trial than at the time of alienation, from causes other than improvements made subsequent to such alienation, upon the premises, to ascertain the value at the time of alienation; and the judgment should provide for admeasurement according to such value. *ib*

9. The value can be more satisfactorily determined upon the trial than by the commissioners; but the question as to improvements is to be determined by the commissioners. *ib*

10. Where all that appears in the case is that it was admitted, on the trial, that improvements had been made upon the land, and that the premises were more valuable than when the husband's title passed from him, the only proper judgment is that commissioners be appointed, upon application to the court, to admeasure dower in the land, pursuant to the statute; unless it affirmatively appears that the lands were enhanced in value from other causes. *ib*

11. A judgment for the unqualified recovery of one third of the land is not warranted, in such a case. *ib*

See HUSBAND AND WIFE, 1.

E

EJECTMENT.

1. To maintain ejectment, the plaintiff must establish that he is the owner

of the premises in question, and lawfully entitled to the immediate possession of the same, and that the defendant was, at the time of the commencement of the action, in actual possession of said premises, and unlawfully and wrongfully withholds such possession from the plaintiff. *Per E. D. SMITH, J. Pierce v. Tuttle, 155*

2. Ejectment is purely a legal action. It is brought to assert and establish a legal title to land, and the right of possession essential to sustain the action must be such as follows the legal title. *Per E. D. SMITH, J. ib*

3. An entry under a contract to purchase, is an entry by leave and a license which, while it remains unrevoked, protects such possession, as against an action of ejectment. A vendor cannot eject his own vendee who has entered by license, or under an express agreement giving him such possession, until such license is rescinded, or such agreement broken on the part of the vendee. *ib*

4. But if the vendee is in default in making any of the payments, or in performing any of the conditions or covenants specified in the contract of sale, ejectment may be brought by the vendor, without any notice to quit, or demand of possession. *ib*

5. If the vendor, on the day appointed, offers to perform on his part, and tenders a deed for that purpose, but the vendee does not pay the purchase money, or offer to do so, but refuses to receive the deed, this puts the latter in default; and the legal consequence of such default is, that it revokes the vendee's license to occupy the premises, and makes his occupation, thereafter, wrongful. The vendor may thereupon bring ejectment, without giving any notice to quit. *ib*

6. In ejectment by vendor against vendee, the latter can only defend his possession by showing a performance on his part, or that he is not in default. *ib*

7. It is no defense to such an action that there is a mortgage which is a lien upon the premises, beyond the incumbrances specified in the con-

tract and assumed by the vendee, where there is a balance of purchase money still due, over and above the amount of all the incumbrances. If the vendee is not content to take the title of the land, he should specify his objections and give up the possession. Or, if he is unwilling to give up the possession, and proposes, notwithstanding the mortgage, to affirm the contract and insist on its execution, he should at the time a deed is tendered, and the money demanded, tender all the purchase money, except a sum sufficient to discharge the incumbrances, and specify his objections to the deed, if he has any other. *ib*

EMINENT DOMAIN.

The right of eminent domain, in the state, does not authorize the taking of property belonging to the public as a highway, and donating it to an individual. *The People ex rel. Failing v. The Com'rs of Highways of the town of Palatine*, 70

EQUITABLE DEFENSE.

1. Although a subsequent valid executory agreement, while its stipulations remain unperformed, cannot be pleaded as an *accord and satisfaction*, in a legal action brought upon a sealed instrument, a *tender of performance*, by the defendant may now be interposed, as an *equitable defense*, under the provisions of the Code of Procedure; and the court having equitable jurisdiction in all cases, may decree a satisfaction of the sealed instrument. *Per MORGAN, J. Scott v. Frink*, 538
2. The authorities which deny the right of a defendant to set up a valid executory agreement, in avoidance of a suit brought upon a sealed obligation, are based upon technical rules of pleading in *legal actions*, and have no application to pleadings under the Code. *Per MORGAN, J.* *ib*

ESTOPPEL.

See DOWER, 8.
HUSBAND AND WIFE 1, 2.

EVIDENCE.

1. In an action to recover damages for an assault upon the plaintiff with intent to commit a rape upon her, the proof to sustain the action must be of the same nature and degree as if the defendant were on trial upon an indictment for an attempt to commit a rape, and the case should be tried upon the same principles. *Per E. D. SMITH, J. Croesman v. Bradley*, 125
2. In such an action, any evidence to repel the allegation of *force*—to show consent, or that no violence was done or designed to the will of the plaintiff—is necessarily admissible, as tending to disprove the very body of the crime. *ib*
3. Every species of evidence showing previous lascivious conduct on the part of the plaintiff, in the presence of the defendant, or in her intercourse with him, designed or adapted to incite or invite him to take liberties with her person, or induce him to believe that such advances on his part would not be unacceptable to her, are clearly admissible, in such an action. *Johnson, J., dissented.* *ib*
4. Evidence of facts tending to prove either that the plaintiff was seeking to induce the defendant to have sexual intercourse with her, or was seeking to entrap him into difficulties arising from an action for an assault, is admissible, within the above rule, as tending to show *consent* on the part of the plaintiff, and that no undesired force or violence was used or attempted upon her person. *ib*
5. But the evidence of particular acts of immodesty on the part of the plaintiff should be limited to those committed with, or in the presence of, the defendant. *ib*
6. Parol evidence is not admissible to contradict or vary written contracts, or their *legal effect*. *Thomas v. Truett*, 200
7. If it becomes necessary to ascertain the subject matter to which a contract relates, and the circumstances connected therewith, for the purpose of understanding the contract; such subject matter or circum-

stances may be proved by parol, and such evidence is not in conflict with the rule touching parol evidence to contradict or vary written instruments. *ib*

See PROMISSORY NOTES.

EXCEPTIONS, BILL OF.

See PRACTICE, 1.

EXECUTION.

1. Where a *fi. fa.* has been issued within five years from the recovery of a judgment, and returned wholly unsatisfied, no leave from the court is necessary to the issuing of a second execution. *Flanagan v. Timon*, 587
2. The case of *Allen v. Clark*, (11 How. Pr. Rep. 213,) in which it is intimated that in no case can an execution issue, after the death of the defendant therein, without leave of the court, disapproved. *ib*

See APPEAL, 7.

HUSBAND AND WIFE, 9.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator, in this state, as a trustee of the estate, may create a charge upon it for expenses attending his administration, which he is authorized to incur in the proper discharge of his trust. *Ferrin v. Myrick*, 76
2. Thus he may render the estate liable by contracting for suitable headstones to be placed at the grave of the deceased, where there are sufficient assets properly applicable to that purpose. *ib*
3. An executor or administrator by ordering such articles, as a part of the funeral expenses, makes himself personally liable for them; but if he pays for them himself, the estate is liable over to him for the amount. *ib*
4. The statute provides how the account of an executor shall be rendered, upon any accounting before

the surrogate, and what examination may be had, (2 R. S. 92, § 54,) and when the settlement appears to have been final, and all the parties interested to have been before the surrogate, the presumption must be that the settlement embraced every thing which was a proper subject of inquiry. *Brown v. Brown*, 217

5. Where, upon a proceeding before the surrogate to compel a final accounting, by an executrix, it appeared that several years previously, upon the petition of the executrix for a final settlement of her accounts, citations were issued to all the parties interested, and an accounting had; that the same parties who appeared in the second proceeding, appeared on that occasion by counsel, and were heard before the surrogate; and a final decree was made thereon by the surrogate, from which such parties did not appeal; *Held* that the settlement of the executrix's account in such previous proceeding was to be deemed final and conclusive as to all matters up to the time when it was made, and was therefore the proper basis for the accounting to be had in the second proceeding; and the executrix was not bound to go behind it. *ib*
6. Such former settlement would not be conclusive, however, if it were made to appear, affirmatively, that there were other assets which had come to the hands of the executrix properly chargeable to her, and which were not embraced in the account. *Per* JOHNSON, J. *ib*
7. The statute does not declare that such settlement shall be conclusive as to the assets which have come to the hands of the executor. But as that is a proper subject of inquiry, upon every such settlement, it should be deemed to have been made, and the decree founded upon the accounting be so far conclusive as to form the basis of a further final accounting, unless something is shown to have been in the hands of such executor as assets, which should have been accounted for, but was not. *Per* JOHNSON, J. *ib*
8. Where an action is instituted to prove a will, under the Revised

Statutes, executed according to the laws of this state, the original will being in the possession of an English court of probate, and no defense is interposed, the answers admitting the allegations of the complaint and joining in a prayer for probate here; and no trial has been had, no extra allowance can be made in the judgment, to the attorneys appearing in the action. *Fritch v. Campbell*, 825

9. As to the defendants' attorneys, in such a case, the court has no authority to give any thing, except for costs; and the plaintiffs being executors, and having, in the execution of their duties as such, employed attorneys to prosecute the suit, the estate must indemnify the executors for their necessary expenses, including counsel fees reasonably and properly paid. And for such sum as the attorney can establish at law as the value of his services, he has his action against the executors. *ib*
10. The executors may pay their attorney such sum therefor, as they are satisfied will pass on the final settlement of their account. *ib*
11. But the court should not allow an amount which would be unreasonable if the executors had paid it without the order of the court. *ib*
12. *Held*, in this case, that the plaintiffs, as executors, would not have been justified in paying \$3000 as counsel fees in an action to obtain the probate of an uncontested will. *ib*

See SURREGATE.

F

FERRY COMPANY.

See NEGLIGENCE, 1.

FOREIGN CORPORATIONS.

1. The object, and the effect of the statutes of this state, passed in 1853 and 1855, requiring corporations created by other states, and doing business in New York, to appoint an

agent here, to receive service of process against such corporations, were to prevent our citizens being forced to bring a suit against a foreign corporation transacting business within our territory, and to afford them a method of commencing a suit here, against such foreign company; but without in any way cutting off the right of such company, after being regularly sued in our courts, to remove the litigation to the courts of the United States. *Fisk v. Chicago, Rock Island &c. Railroad Co.*, 472

2. A railroad company, whatever acts it may have done within our territory, dwells in the place of its creation, and if not chartered by this state, it is a foreign corporation—a citizen of another state—and its citizenship cannot be questioned, for the purpose of defeating the jurisdiction of the United States courts over an action brought against it. *ib*

See INJUNCTION.

FORFEITURE.

See CORPORATION, 2, 3, 5.

FRAUD.

See INSURANCE, (LIFE.)

FRAUDS, STATUTE OF.

1. The statute of frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred, where the principal adopts the act of the agent. *Pringle v. Spaulding*, 17
2. An authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal. *ib*
3. By the statute of frauds, an agreement for the sale of lands, to be valid, must be binding upon all the parties by whom the sale is to be made. *Snyder v. Nesfue*, 68

4. The word "party," in the statute, means all the vendors, when more than one are included in the contract of sale. *ib*
5. Where an agreement for the sale of land owned by two persons as tenants in common is subscribed by a third person as their agent, it must appear that he was duly authorized by both the vendors to sign the contract. If authorized by one only, the agreement is not binding upon either of the parties thereto. *J. F. BARNARD, J., dissented. ib*
6. To be binding, the contract must be signed by the vendors, all of them, personally or by an authorized agent, and the contract as it appears on its face, must be assented to by the vendee. *ib*

FREIGHT.

See PARTNERSHIP, 3.

G

GOVERNOR.

See OFFICE.

GRANT.

1. In order to avoid a subsequent grant, under the statute concerning the conveyance of lands adversely possessed, the prior possession must be under claim of some specific title. The title under which the prior possession is claimed to be held must cover the premises. *Hallas v. Bell, 247*
2. If the lines under the first grant are erroneously located, so as to embrace more land than is actually covered by such grant, the subsequent grant of the land contiguous to the first is not affected, as to that portion thus erroneously included within the lines by the first grantee, though actually occupied, and claimed by him under his grant. *ib*
3. The "claim" to the land possessed must be "under a title," or it will not affect the subsequent grant,

otherwise valid, of the disputed territory. If the prior adverse possession has continued for a period of twenty years, "under claim of title," such claim will be good against the legal title; even though a portion of the premises so possessed is not covered by the conveyance. *ib*

4. Where, in an action for trespass on land, it is determined by the verdict that the grant to the plaintiff did not cover the land in dispute, but that it was embraced in a subsequent conveyance from the same grantor to the defendant, the claim of the plaintiff is not "under," but outside of his title, and the defendant's grant of the disputed piece, is valid. *ib*

GUARANTY.

1. After a guarantor of rent has become fixed and liable for rent in arrear, such liability can only be discharged by payment, release or other satisfaction. It will not be discharged by a surrender by the lessees, of the unexpired term and the possession of the demised premises without the knowledge or consent of the guarantor, upon an agreement that the lessor will release his claim for rent yet to accrue, but that such surrender shall not affect his claim for rent already due. *JOHNSON, J., dissented. Kingsbury v. Williams, 142*
2. Such a case is not within the principle which discharges a surety upon the ground of a variation of the contract without his consent; the remedies of the guarantor being in no way impaired or delayed by the surrender. *ib*

H

HIGHWAYS.

*See CONSTITUTIONAL LAW.
JUSTICE'S COURT, 2.*

HUSBAND AND WIFE.

1. The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower.

- Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel. *Maloney v. Horan*, 29
2. When the deed of the husband has been avoided, at the suit of creditors, on the ground that it was made with intent to hinder, delay or defraud them, there remains an estate in the fraudulent grantee, which is sufficient to support or feed this estoppel; for the fraudulent deed is good and effectual as between the parties to it. A payment by the fraudulent grantee or grantor to the creditors, of their debts, would extinguish the same, and render his title valid. *ib*
 3. Whatever consequence may ensue from proceedings by the creditors *in rem*, upon the estate fraudulently conveyed, is attributable to the statute, which, in conjunction with the decree, acts directly upon such estate, and divests so much thereof only, as may be necessary to obtain satisfaction of the claims of creditors; and the wife's dower in that part of the estate so divested will be as effectually barred as in the part which may remain vested in the fraudulent grantee. There cannot, in the nature of the case, be any severance. *ib*
 4. And so if the whole estate be taken away; because this results from the enforcement of the remedy, and not because the fraudulent deed conveyed nothing to the grantee. *ib*
 5. Where a subpoena is issued against husband and wife, service on the husband alone is a good service on both; unless relief is sought against the separate estate of the wife; in which case service should be made upon her. *Foots v. Lathrop*, 183
 6. Where an action is brought against husband and wife to foreclose a mortgage executed by them jointly, and an attorney appears in the action, for both, on the retainer of the husband, and judgment of foreclosure is entered, the wife cannot, after her husband's death, avoid the judgment on the ground that she was not served with process in the action, and did not appear therein. *ib*
 7. An action cannot be maintained by a husband against his wife to obtain a decree declaring void a marriage contract, on the ground that a former husband of the defendant went to another state and there commenced a suit against her for a divorce, and that she, by collusion with the plaintiff in that action, aided him in fraudulently obtaining a divorce there; and that the plaintiff married the defendant on the faith of the representation that she "had procured a valid divorce" from her former husband. *Kinnier v. Kinnier*, 454
 8. If the parties to the former action colluded together and thereby fraudulently obtained the decree of divorce, neither of such parties could possibly avoid such decree. It is binding upon both, and the second marriage is valid; and as the second husband could not be prejudiced, if his marriage was lawful, he—a stranger—has no interest in the matter which will authorize him to impeach the judgment for fraud. *ib*
 9. For an assault and battery committed by the wife alone, both the husband and wife are liable; and judgment being rendered against both, the execution must follow it, and direct the collection of damages and costs out of the property of both. *Flanagan v. Tinen*, 587
 10. Such judgment becomes a lien on the real estate of which the husband is owner, at the time of the rendition thereof, and on such as he may thereafter acquire. His death will not impair such lien, nor the right of the plaintiff to enforce it against the land. *ib*
 11. If the husband has real estate, and an execution issued during his lifetime is returned by the sheriff *nulla bona*, the court will cancel such return, and take the execution off the files and return it to the sheriff, to the end that he may proceed and sell the real estate by virtue of it. *ib*
 12. Where, by mistake, land purchased by a married woman, is conveyed to her husband, instead of herself, the wife, in an action brought by her against the sheriff to recover the value of hay and cows seized by

- him upon execution against the husband, as being the property of the latter, may prove the mistake in the deed, and that it was rectified by the grantee conveying the farm to a third person who has conveyed it to the plaintiff. *Garrity v. Haynes*, 596
13. In such a case, after the mistake is rectified, the wife has the legal as well as the equitable title to the farm. And although previous to that time the husband held the legal title, by virtue of the deed to him, it was a mere naked title without interest, and one upon which a judgment against him could not fasten as an effective lien. *ib*
14. The wife, as the owner in equity of the farm, is entitled to the issues and profits thereof, and the fact that her husband resides on the farm with her, and assists her in cutting and curing the hay, will not make him the owner of the same. *ib*
15. The cows were purchased on credit, and a note given for the price, by the wife and another person, which was subsequently paid by the wife, but not until after the sheriff levied on the cows. The court charged the jury, "if the cows were purchased at the request of the plaintiff and as her property, and for her, she having subsequently paid for the cows, they may have been her separate property and she entitled to recover for them." *Held*, that this part of the charge was correct. *ib*
16. The court refused to charge the jury that "as to the cows, if the note given for them by the husband and another had not been paid at the time of the levy, then the title to the cows was not in the plaintiff; there being no evidence that she had ever promised to pay the note." *Held* that the request was properly refused. *ib*
17. *Held, also*, that if there was any doubt as to the right of the plaintiff to maintain the action for the levy upon the cows and hay, yet if there was no fraud in the case, or intention to defraud the creditors of the husband, the right of the plaintiff to recover for the subsequent sale of the cows and hay, was clear; she then being entitled to the possession of the property, and having the legal as well as the equitable title thereto, as against her husband. *ib*
18. The Supreme Court has no authority to decree a separation between husband and wife, or to make an order for the support and maintenance of the wife by her husband, except that specially conferred by the statute. (2 R. S. 5th ed. p. 237, § 55.) And the statute does not authorize a bill or complaint to be filed by a wife for a support and maintenance by her husband, as a distinct substantive relief. *Atwater v. Atwater*, 621
19. That relief can only be granted when a separation is asked; and the statute, in terms, states three causes only for which such separation may be adjudged, viz: 1. The cruel and inhuman treatment by the husband of his wife; 2. Such conduct on the part of the husband, towards his wife, as may render it unsafe and improper for her to cohabit with him; 3. The abandonment of the wife by the husband, and his refusal or neglect to provide for her. *ib*
20. Where the plaintiff, in her complaint, alleges facts bringing her case within each of these three causes, but the referee finds that she has entirely failed to establish the first and second, and as to the third he finds that there has been no abandonment of the plaintiff, by the defendant, but that he has refused and neglected to provide for her, the plaintiff is not entitled to a judgment for a separation; abandonment and refusal or neglect, being both necessary to justify such a judgment. *ib*

I

ILLEGALITY.

See PRESUMPTION.

PROMISSORY NOTES, 10, 11.

INJUNCTION.

Where, in an action by holders of original stock in a corporation created under the laws of other states, to set aside an issue of new stock

made by the directors, it appears that the legislature of one of such states has passed an act confirming such issue of stock, and the Supreme Court of the other state has decided that such issue was legal and valid, this court will not continue an injunction restraining the use of the proceeds of the sale, or appoint a receiver of such proceeds; especially where the action is approved by a large majority of all the stockholders. *O'Brien v. The Chicago, Rock Island &c. Railroad Company*, 568

See RAILROAD COMPANIES, 12.

INNKEEPER.

The plaintiff stopped at the defendant's tavern with his two horses, which he had put in the barn and fed, and took dinner himself. Having paid his bill, he requested the defendant to get his horses. The latter told him to go on and be hitching up, and he (the defendant) would be out in a few minutes. The plaintiff went to the barn, put the head-stalls on the horses, and while getting the team out, the defendant arrived. Previously two men arrived at the inn, and placed their horse (a stallion) in a stall between those occupied by the plaintiff's horses and the outer door. The plaintiff led one of his horses out of the door, and the other followed on, as it was accustomed to do, and when passing the stall where the stallion stood, received a kick from him which broke its leg, resulting in its death. *Held* that the defendant's liability as an innkeeper was not at an end, when the injury occurred, the horses being still on his premises, and in his barn; that the plaintiff was only doing for the defendant, and with his assent, what it was his duty to do himself; and that unless there was some improper conduct on the part of the plaintiff, which caused the injury, the defendant was liable to the same extent as though he, instead of the plaintiff, had been handling the horses at the time. *Seymour v. Cook*, 451

INSANITY.

See DIVORCE.

INSOLVENT DEBTORS.

See DEBTOR AND CREDITOR, 1.

INSURANCE, (LIFE.)

In the year 1861 D. L. Jr. effected an insurance on his life, with the plaintiff, for \$5000. In November, 1862, being under a promise of marriage to M. R., he assigned the policy to her, and notified the plaintiffs thereof, and the policy was marked on the books of the company as assigned to her. In 1863, the insured, not having the money to continue the payments of premiums, his uncle, D. L., promised to keep the policy paid up if it was for the benefit of the insured's mother and sisters, otherwise not. The insured promised to send D. L. the policy immediately. He soon after applied to M. R. who had the policy, to send it to him, as he had heard it had expired. She did so send it, and the insured sent it to D. L. In April, 1864, he made an attempt to have the policy put in his mother's name on the plaintiffs' books, and being told that M. R. must reassign it to him, or to his mother, he applied to M. R. for an assignment of the policy in order to renew it, saying it had expired. She thereupon executed an assignment to him, without asking why he wished it; saying she "had confidence in him and gave him her signature." *Held* that upon these facts there was no fraud or deception practiced by the insured, in procuring the assignment of the policy from M. R., and that the judge was justified in so finding. *The Washington Life Insurance Company v. Lawrence*, 387

J

JOINDER.

See COMPLAINT, 1.

JUDGMENT.

In September, 1861, the defendants, partners under the firm name of B. & Co., recovered a judgment for

\$1088.46 against D. and others composing the firm of D., G. & Co. On the 19th of March, 1863, after the dissolution of the latter firm, G., one of the partners therein, on paying ten per cent of the amount of the judgment, obtained from R., one of the firm of B. & Co., a release executed by him in the name of the firm, of G.'s individual liability on the judgment, under the "act for the relief of partners and joint debtors," passed April 18, 1838, for which release he paid ten per cent of the whole amount of the judgment. On the 15th of February, 1866, the judgment was assigned to the plaintiff, by B., for the consideration of \$100, by an instrument executed by him in the name of the firm of B. & Co., but without any authority therefor from B., or subsequent assent by him. The assignment contained a covenant "that there is now due on said judgment the sum of \$1088.46 and interest from September 2, 1861, and that they (the assignors) will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment." It appeared that G. the debtor so released, was solvent and able to pay the whole debt, but that the other judgment debtors were either dead or insolvent, except one, from whom the plaintiff had collected \$102.16. *Held*, 1. That the assignment was effectual to vest in the assignee all the interest and title of B. & Co. in the judgment, but that R., not having signed the same, was not liable on the *covenants* contained in it. 2. That the measure of damages in an action by the plaintiff as assignee, against B. for breach of the covenant, was ten per cent of the amount of the judgment, being \$108.84, and interest, without applying in reduction thereof, the amount collected by the plaintiff from one of the judgment debtors. 3. That the covenant, in the assignment, that the whole amount of the judgment was due, was not to be construed to mean that none of the judgment debtors had been released or discharged from it. *Bennett v. Bushan*, 578

See CORPORATION, 2, 4, 5.
DOWER, 4, 5.
HUSBAND AND WIFE, 6, 9, 10.
MARRIED WOMEN, 2.

JURISDICTION.

The Supreme Court has jurisdiction, in actions brought by citizens of this state as holders of stock of a railroad corporation created by the states of Illinois and Iowa, for the purpose of restraining, by injunction, the use of the proceeds of an issue of stock alleged to be illegal and void, and appointing a receiver of such proceeds. *Fisk v. The Chicago, Rock Island &c. Railroad Company*, 518

See HUSBAND AND WIFE, 18, 19, 20.
REFEERE.
SURROGATE.
TAXES AND TAXATION, 3, 5, 6.

JUSTICE'S COURT.

1. The rule in a justice's court is the same as in all other courts—that if a material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed on appeal, whether the trial is with or without a jury. *Moore v. Noble*, 425
2. The plaintiff brought an action in a justice's court, alleging in his complaint that the defendant wrongfully and unlawfully broke and entered his close, and cut timber and did other acts upon said premises. The defendant, by his answer, justified all the acts complained of, on the ground that the *locus in quo* was a public highway, used and occupied by the public as such. *Held*, that the justice was right in dismissing the action, on the ground that the title to land came in question. *Heath v. Barmour*, 444

See AMENDMENTS, 5.
COUNTY COURT, 1.

L

LEASE.

1. A lease of a dairy farm, with cows and other property, for a term of years, at a specified rent payable yearly, contained this clause: "The party of the first part [the lessors] are to have full title, with the priv-

ilege of taking possession at any and all times, of any and all products of the farm, in payment of the balance due on the rent," &c. *Held* that this clause was a mere security for money, and was necessarily in the nature of a *chattel mortgage*; and that the only title the lessors had to the hay raised on the farm being that of chattel mortgagees, that was the title which passed to an assignee, by their assignment to him of the counterpart of the lease, as between such assignee and the tenant. *Johnson v. Orefoot*, 574

2. *Held, also*, that the lease never having been filed as a chattel mortgage, as required by the statute to make it valid as against the creditors of the lessee, and the tenant being in possession of the farm, when the hay was levied upon and sold by his creditors, on execution, no action could be maintained by the assignee of the lease against the sheriff, to recover the value thereof, in the absence of any default in the payment of rent. *ib*

LEX LOCI CONTRACTUS.

An agreement for the loan of money, made and consummated in this state by residents thereof, by which the borrower is to give a bond accompanied by a mortgage upon lands in Wisconsin, no place of payment being specified, is governed by the usury laws of New York and not by those of Wisconsin. *Cope v. Alden*, 350

LIEN.

See BANKS.

LIMITATIONS, STATUTE OF.

See VENDOR AND PURCHASER, 4.

M

MAJOR-GENERAL.

See OFFICE.

MANDAMUS.

1. Where private interests only, or chiefly, are concerned, and the people are only the nominal party, the relator, who is the real party applying for a mandamus, must show that he, as an individual, is entitled to the relief sought. *The People ex rel. Stephens v. Halsey*, 547
2. But on an application for a mandamus to compel a county treasurer to issue his warrant to enforce the collection of a tax assessed upon debts owing to non-residents, the relator demanding the relief, not for himself, but for the public, the supervisor of the town, being an inhabitant of the town, and a tax-payer therein, is a proper person to appear as relator. *ib*
3. The legislature having "authorized and empowered" a board of supervisors to cause taxes illegally assessed and paid in their county to be repaid, it becomes their duty to do so, whenever truthful claims for such taxes are duly presented to them; and if they fail to perform that duty, but determine that the county and the towns against which the claims are made cannot in justice refund such taxes; that the claims are invalid; and that the same be not allowed, such board will be compelled by mandamus to proceed and perform such duty. *The People ex rel. The Central Bank of Cherry Valley v. The Board of Supervisors of the County of Otsego*, 564

See MILITARY BOUNTIES.
TAXES AND TAXATION, 2.

MARRIED WOMEN.

1. The necessary effect and intent of the act of 1862, authorizing married women to sue and be sued in courts of law, "in the same manner as if they were sole," is to remove all the disabilities of coverture, so far as to enable a married woman to hold separate property and to carry on trade and business, and make all the ordinary and incidental contracts relating thereto, and to be sued in respect to such contracts, in all respects as though she were in fact

unmarried. *The First National Bank of Camandigua v. Garlinghouse*, 615

2. Hence she may confess a judgment to secure a debt contracted by her, and for her use and benefit, in carrying on her separate business. *JOHNSON, J.*, dissented. ib

MASTER AND SERVANT.

See NUISANCE.

MILITARY BOUNTIES.

On the 15th day of March, 1864, fifteen proper persons signed a call for a special town meeting of the town of Westford, "for the purpose of paying bounties to volunteers in the military or naval service of the United States, during the existence of the war now carried on." The town clerk posted notices for one, following the language of the call. At the town meeting a resolution was offered that "there be paid \$300 to each man drafted, and not *exempted*." It was amended so as to include those who were drafted the year before and paid \$300, and, as amended, was passed. On the 8th of June, 1864, the relator was drafted as one of the quota of the town, under the call of December 17, 1864, and paid \$300 commutation. In April, 1865, the legislature passed an act legalizing the proceedings of town meetings in the county of Otsego (the town of Westford being therein) relating to the payment of *bounties* to volunteers, substitutes and *drafted men*. *Held*, 1. That the relator was not *exempted*, within the meaning of the exception in the resolution, and that it should not be restricted so as to include only those who were drafted and actually entered the service. 2. That it applied to persons *thereafter* drafted under an impending call of the president. 3. That the resolution was not void, as contrary to the policy of the general government, for the reason that it tended to keep *men* out of the service. 4. That the repayment of the \$300 commutation was a "bounty," within the act of the legislature. 5. That the defendants should not have been required *forthwith* to as-

semble and audit the relator's claim, but the mandamus should have ordered them to do so at their next annual meeting. *The People ex rel. Lowell v. The Board of Town Auditors of the Town of Westford*, 555

MILITARY OFFICES.

See OFFICER.

MISTAKE.

See HUSBAND AND WIFE, 12, 18.

MORTGAGE.

1. Wherever a conveyance transferring an estate is originally intended, between the parties, as a security for money or for any other incumbrance, whether this intention appears from the same instrument or any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations contained in it. *Elliott v. Wood*, 285
2. A mortgagee of property, authorized by the mortgage to sell the property at public auction, and to become a purchaser of it at the sale, is not in that peculiar confidential relation to the mortgagor which the law regards as a fiduciary relation, such as that of guardian and ward, attorney and client, or trustee and *cestui que trust*. ib
3. Under the statute authorizing a sale of mortgaged premises by advertisement, in all cases where the mortgage contains a power of sale, on complying with the requirements of the statute as to the manner of advertising and conducting the sale, and declaring that every sale made pursuant to such a power shall be equivalent to a foreclosure and sale under the decree of a court of equity, it is only necessary, in a case where the mortgage provides that the notice of sale shall be for a shorter time, and in a different manner from that specified in the statute, that the sale should be public and not private, and that there should be notice. ib

4. By this, the rights of mortgagors are sufficiently protected; and if they have themselves provided expressly for a time and manner different from that prescribed by the statute, and if the sale is in conformity with the provisions of the mortgage, it will be upheld, particularly when it is manifest that the method contained in such provisions is more likely to secure notice to the mortgagor than the method prescribed by the statute. *Per CLERKE, P. J.* ib
5. As the 7th section of the statute expressly declares that the mortgagee, his assigns, &c., may fairly and in good faith purchase the mortgaged premises at the sale, and as the section makes no exception, this can be done even when the mortgage contains no provision to that effect. ib
6. As usurious contracts are not absolutely void, but are capable of being treated as valid, by the borrower, if the mortgagor allows the property to be sold under a foreclosure, without taking the necessary means to avoid the mortgage, an innocent purchaser cannot be affected by any usury in the loan. ib

N

NATIONAL BANKS.

♦
See BANKS.

NEGLIGENCE.

1. If a ferry company, at the very threshold of its gate, places a log, against which its passengers would be in danger of stumbling in the dark, it is bound to do everything in its power to guard against the danger. If it omits to place a light near the obstruction, for the protection of passengers upon its boats, it is guilty of negligence. *Osborn v. The Union Ferry Company,* 629
2. The ordinary rule that a master is, in all cases, liable for the negligence of his servant, does not, unqualifiedly, apply to injuries caused by the negligence of a contractor, or his

employees. Yet where the contractor has stipulated to use the necessary precautionary measures to protect the public against accidents, the owner or employer is relieved from responsibility. ib

8. The contract between the owner of property, and a contractor, for the making of certain improvements thereon, provided that "in case the owner shall be held or made liable for any injury arising out of neglect or willful default of the said party (the contractor) or any of their workmen, the owner may deduct any such amount as he may be obliged to pay on said account, from the contract price." *Held*, that this provision was inserted, not to shift the responsibility to third persons on the contractor, but to indemnify the owner for any damages which such persons might recover against him, on account of the negligence of the contractor. ib

See NUISANCE.

RAILROAD COMPANIES, 5, 6, 7.

NOTICE.

The rule is well settled, that where a notice is required or authorized by statute, in legal proceedings, it means written notice. *Pearson v. Lovejoy,* 407

See APPEAL, 3, 4.

NUISANCE.

1. The placing a piece of timber in the public street, and keeping it there, is the commission and continuance of a nuisance, being an obstruction of the full and free enjoyment of the easement. *Osborn v. Union Ferry Company,* 629
2. The public being entitled to the use of the street or highway, whoever, without special authority, obstructs it, or renders its use hazardous, by doing any thing upon, above, or below, the surface, is guilty of a nuisance; and any one sustaining special damage from it, without any want of due care to avoid injury,

has a remedy against the person continuing the nuisance. *ib*

3. The act is wrongful, and does not involve a question of mere negligence. Consequently, even if the contract between the owner of property and one undertaking to make improvements thereon, contains a provision that the latter shall use all precautionary measures to protect the public, such owner will nevertheless be liable for any damages sustained by an individual in consequence of the placing and continuance of a nuisance in the public street, at the procurement and with the concurrence of the owner of the property. *ib*

O

OFFICE.

1. The governor has no power, during a recess of the senate, and without its consent, to appoint a major-general of the State National Guard, to fill a vacancy occurring, in time of peace. *The People v. Molinoux*, 9
2. The act of 1849, "to provide for filling vacancies in office," was passed to provide for the filling of vacancies in elective offices, only. *ib*
3. There is either a *casus omissus* in the statute, on this subject, or the legislature has intentionally left a vacancy in the office of major-general occurring in time of peace, to be filled in the ordinary way, viz., by a simple devolution of the command upon the officer next in rank. *Per GILBERT, J.* *ib*

ONUS PROBANDI.

See DEBTOR AND CREDITOR, 2.
DIVORCE, 1.
PAYMENT, 5.
PRESUMPTION.

ORDER FOR PUBLICATION.

See PRACTICE, 10 to 17.

P

PARTIES.

Where a cause of action sounding in tort is stated in the complaint, against a married woman, her husband is properly joined with her as a defendant in the action. *Anderson v. Hill*, 238

See MANDAMUS, 2.
RAILROAD COMPANIES, 2, 3.

PARTNERSHIP.

1. Although, where there is a general partnership, and one of the firm borrows money in the name and upon the credit of the firm, the lender may recover against the firm, if he has acted in good faith, notwithstanding that the money was ultimately misapplied by the partner borrowing it; yet if the lender knows, at the time of the loan, that it is the intention of the borrower to apply it to his individual use, and afterwards it is so applied, he cannot recover from the firm; or if he has good reason to believe from surrounding circumstances, that such is the intention of the borrower, he is put upon inquiry to ascertain from the other members of the firm whether the loan is sought to be made with their consent and for their use. *Billings v. Meigs*, 272
2. So when a banker has the funds of a firm deposited with him for the purpose of its especial business, and when he knows that one of the firm is engaged in individual speculations, and he transfers these funds to the separate account of this member, and with knowledge that the latter appropriates the funds to such speculations, the banker is liable for the funds thus misapplied, unless they first assure him of their consent. *ib*
3. Where part owners of a vessel then under a charter to a foreign government, assigned to the plaintiffs all their interest in said charter, and in and to the freight to be earned under the same; *Held*, in an action brought by the plaintiffs to recover their share of the freight earned by

the vessel, during the last voyage, that such freight was subject to an accounting between the several co-owners, for all previous voyages; it appearing that the former voyages and the one in question were all one entire, connected and continued partnership transaction. And that the rights of the plaintiffs, as assignees, were only in and to the balance, which on a settlement of the accounts of said several voyages between said co-owners, might be found due to the plaintiffs as such assignees. *Williams v. Lawrence*, 820

4. It is not necessary to the validity of a release or discharge of one of the copartners of a dissolved firm from a debt or liability of the partnership, that he should have made actual payment of any part thereof to the creditor. It is enough that for any reason the creditor discharges or releases him in the terms required by the laws of 1888, ch. 257, and laws of 1845, ch. 848. It makes no difference with the rights or obligations of his associate debtors, whether he obtained the discharge with or without payment; unless such payment exceeds his proportionate part of the whole demand; for the act of 1888 makes him responsible over to his co-debtors, notwithstanding the discharge by the creditor, to the full amount of his proportionate share, less what he has paid to the creditor, if any thing, upon obtaining such discharge. *Per FOSTER, J. Bennett v. Buchan*, 578

See JUDGMENT.

PAYMENT.

1. An agreement by a creditor to take the note of a third person in payment of his debt, with the actual transfer of the same, and a written acknowledgment that it is so taken without recourse, on account of the creditor's claim, furnish sufficient grounds for the jury to find that the note was taken at the risk of the creditor. If so, the receipt of the note is a payment of the claim, and an extinguishment of the right of action thereon. *Roberts v. Fisher*, 69
2. In order to make the receiving of the note of a third person, by a vendor, from the vendee, a payment of the price, there must be an agreement between the parties that such note shall be taken by the vendor in payment for the property sold. *Gibson v. Toby*, 191
8. When the sale and delivery of the property and the transfer of the note are at the same time, a *presumption* arises that the parties agreed to an exchange of property; that is, that the vendor should sell and deliver his property for the note to be transferred by the other party; and the agreement being executed, the note is taken at the risk of the party taking it for his property. *ib*
4. The fact of a simultaneous exchange is the evidence from which the agreement is *presumed*. But this presumption is not conclusive. The party taking the note may show that it was not the agreement that he should take the note at his own risk, in exchange for his property. *ib*
5. If the debt exists at the time the note or draft of a third person is transferred, an agreement is required that it shall be payment. The *onus* of showing this is upon the debtor. By proving an express agreement that his creditor should take the note of a third person in payment of the debt, he proves an accord, and by adding the proof of the delivery to, and acceptance by, his creditor, he proves the satisfaction. *ib*
6. Where, by an agreement for the sale of hogs, payment of the price was to be made in cash, and the hogs having been weighed, the agent of the purchasers expressed a desire to ship them at once, saying he had not time to pay then, but a third person would see that the vendor was paid, to which the vendor assented, and such agent thereupon drove the hogs to a railroad cattle yard and shipped them on the cars; *Held* that this was a delivery, and the purchasers became the debtors of the vendor, and were bound to pay the price in cash; unless there was a further agreement between the parties. *ib*
7. And the only subsequent agreement being that an eastern draft should be given to the vendor, by the ven-

dees, as good to him as the money, or better than money; *Held* that the delivery to, and acceptance by the vendor, of an eastern draft, drawn by a third person, for the price, which proved to be worthless, was not a payment of the debt. *ib*

8. What will be deemed due diligence on the part of the vendor, in giving notice to the purchasers, of the dishonor of a draft thus taken for the price of the property sold. *ib*

PLEADING.

See ANSWER.
COMPLAINT.

PRACTICE.

1. Upon a bill of exceptions the court can only review the legal decisions made at the circuit, and those only so far as they were duly excepted to. *Havens v. The Erie Railway Company*, 828
2. It is not the duty of a judge, at the circuit, in response to requests, to go over again the very ground or questions covered by the charge as given; and it is not the right of counsel, when the charge is ended, to seek to get a repetition of a leading idea already fairly expressed, by a request to charge upon it anew, or in some little different phraseology, so as to get in that shape a virtual re-argument of the facts before the jury. *Per E. D. SMITH, J.* *ib*
3. Where it is claimed that an order to show cause is invalid, because not shown to have been made at a regularly adjourned special term, it will not be *presumed* that it was made at a term irregularly held. *The People v. The Central City Bank*, 412
4. When a court has been regularly convened, it continues open till actually adjourned. An order for its continuance is not essential; and an order made by the court that it shall so continue need not be entered with the clerk. If necessary to be entered, it is the duty of the clerk to enter it; or if accidentally omitted, it may be entered by him *nunc pro tunc*, and would even be ordered to be entered on appeal, to sustain proceedings had under it, otherwise regular. *ib*

5. It is the clerk's duty to enter orders of the court, without any special directions to that effect; and his delay or omission to make actual and speedy entry of orders in the minutes will not be allowed to prejudice the substantial rights of parties. *ib*

6. An order for a bank to show cause why its business should not be closed, and a receiver appointed, is properly served upon its vice president; especially where it appears that he is also a director. *ib*

7. Where two receivers of an insolvent bank were appointed, on the same day, by different justices, both of which receivers claimed the assets of the bank, and one was in actual possession thereof; *Held* that it being a question of legal priority which the court was bound to settle, it would inquire into the fractions of the day on which the two receivers were appointed. *ib*

8. The mere preparation and verification of the papers on applications for the appointment of receivers cannot determine the question of priority. *ib*

9. Where two applications were made by different parties, on the same day, before different justices and in different districts, for the appointment of a receiver of a bank; *Held*, that the party who obtained the first judicial action; the first service of papers; the first granting of the order for the appointment of a receiver; and the first perfecting of the appointment, by the execution, approval and filing of the required bond, took precedence of the other party, whose receiver merely first took actual possession of the assets of the bank. *ib*

10. The statute (*Code*, § 185) provides what kind of proof shall be made to the satisfaction of the court or officer granting an order for publication, that a party cannot, after due diligence, be found within the state. That fact must appear by affidavit. The return of a sheriff will not answer; that not being the kind of evidence which the statute requires. *Waffle v. Goble*, 517

11. Nor can the essential fact be made to appear partly by affidavit and

partly by a return. It must be made to appear by affidavit only. *ib*

12. The affidavit may be made by a plaintiff in the action. *ib*

18. The statute does not prescribe who shall make the affidavit, but it must show to the satisfaction of the court or judge that due diligence has been used, and that the person to be served cannot be found within the state. *ib*

14. The filing of the complaint is not necessary, where the summons and complaint are served personally upon the defendant, soon after the order for publication is granted, and where no publication is made. *ib*

15. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post-office. *ib*

16. Where the plaintiff failed to comply with the statutory conditions on which the action was deemed to be commenced, by the issuing of the summons; *Held* that it must be deemed not to have been commenced until the service of the summons and complaint, under the judge's order; that up to that time no action had been commenced, and none was depending; and that an attachment previously issued and levied upon the defendant's property had nothing to support it, but was wholly void, and should be set aside. *ib*

17. The order for publication, in such a case, however, if regularly granted, may be allowed to stand, without any reference to the attachment. *ib*

18. Where an issue is formed upon an answer setting up a defense equivalent or amounting to the plea of *null tiel record*, it is irregular for a judge to proceed at chambers, without a jury, to try that issue and to find his conclusions of fact and of law, and order judgment for the plaintiffs. *Farnacht v. Stehn*, 650

19. The issue formed upon a plea of *null tiel record* is an issue of fact, within the provision of the Revised Statutes requiring all issues of fact to be tried by a jury, except in case of a reference. (2 R. S. 409, § 4.) *ib*

See HUSBAND AND WIFE, 5, 6.
STAY OF PROCEEDINGS.

PRESUMPTION.

1. The court will not presume that a transfer of a security was made in violation of the law. That is a fact, if it exists, to be shown in defense. *Hatch v. Brewster*, 276
2. Illegality is never presumed. On the contrary, every thing must be presumed to have been legally done, until the contrary be proved. *ib*

PRINCIPAL AND AGENT.

1. An authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal. *Pringle v. Spaulding*, 17
2. Where, in an action to recover a balance due on a contract made between the plaintiff's intestate and the defendant, there was but one question of fact between the parties determined by the jury, viz., whether the defendant had paid the amount agreed to be paid, and the defendant's claim that it had been paid, was supported by proof tending to show that one L. who had received the money, was a partner in the contract with the plaintiff's intestate, and also by evidence that the plaintiff had in fact authorized the defendant to pay L.; and the jury, upon conflicting evidence, found for the plaintiff; *Held*, that it must be considered as finally settled that the plaintiff's intestate, alone, was the contractor, and that the plaintiff did not give the defendant any authority to pay to, or L. any authority to receive, for her, the payment for the work. *Coyle v. The City of Brooklyn*, 41
3. And it being conceded that L. did superintend the work, having been employed by the deceased contractor, and continuing to superintend the same under the plaintiff as administratrix of the latter; *Held* that the plaintiff, by claiming under the contract, was not in law bound to ratify, and did not thereby ratify the acts of L. and with them the unauthorized receipt of the money from the defendant, in the absence of any proof of knowledge by her of the receipt of the money by him. *ib*
4. *Held*, also, that the case did not come within the rule that a principal can-

not be permitted to enjoy the fruits of a bargain without adopting the instrumentalities of the agent in consummating it. *ib*

5. That the contract having been made by the principal, performance of it entitled the plaintiff, as his personal representative, to payment, and payment not having been made, to her or her agent duly authorized, her right of action was made out. And that an unauthorized payment to L. could not be ratified by her bringing an action on the contract, as she claimed nothing by reason of such payment, but on the contrary repudiated it entirely. *GILBERT, J., dissented. ib*

6. Although in all cases of purchases and bargains respecting property, made between principals and agents, the utmost good faith is required, yet a sale of his principal's property at which the same is purchased by an agent, is not necessarily void. The transaction should, undoubtedly, be scrutinized closely; but it is only voidable where there has been undue influence and advantage, or where there has been imposition. *Per CLERKE, P. J. Elliott v. Wood, 285*

7. It is different where the strict relation of trustee and *cestui que trust*, exists. In such a case the principle applies where a purchase has been made by a trustee, of the property of his *cestui que trust*; although it was sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether made *bona fide* or not. *Per CLERKE, P. J. ib*

8. The owners of a certain guano island entered into an agreement with W. and G. to convey to the latter one half of said island, for \$30,000; the grantees, in addition to paying that consideration, binding themselves to furnish a working capital of \$20,000; and it was stipulated that W. and G. should have the sole control and management of the property for the mutual benefit of all the owners. A deed was executed, in pursuance of this agreement. The plaintiff, being the owner of one fourth of the property, mortgaged his interest to V. to secure \$8075, and he subsequently executed another mortgage, on his interest, to the defendants, to secure the payment of their claims against him.

By a power contained in such mortgage, the mortgagees were authorized, in case of default of payment, upon a specified notice, to sell the mortgaged property at public auction, with the privilege of themselves becoming the purchasers. In pursuance of the power contained in their mortgage, the defendants, after demand of payment and on notice of sale, sold the plaintiff's interest in the property, and purchased it themselves, for \$25; and subsequently, V., under the power in his mortgage, sold the plaintiff's interest for \$1200, the defendants being also the purchasers. *Held* that the relation between the parties was not that of trustee and *cestui que trust*, but at most it was only one of principal and agent; and that in the absence of any proof of undue influence or advantage or imposition, the sales were valid, unless other principles of law rendered them void. *ib*

See FRAUDS, STATUTE OF, 1, 2, 6.

PRINCIPAL AND SURETY.

1. Where the plaintiff executed a mortgage on her property, for the benefit of, and as surety for, the maker and indorser of promissory notes, and on a foreclosure of the mortgage, the indorser became the purchaser of the premises; *Held* that the plaintiff was entitled to a release and conveyance from the purchaser, of the legal title which he acquired on the foreclosure sale, upon the repayment to him of the amount of taxes and interest he had paid. *Thomas v. Truscott, 200*
2. Prior to the execution of a mortgage by the plaintiff, the mortgagee held certain notes made by B. and indorsed by C. past due, upon which C.'s liability had become absolutely fixed. He and B. both desired an extension of the time of payment, and negotiated therefor. The creditor consented to grant an extension and to take new notes signed and indorsed as before, on condition that further security should be given. The plaintiff thereupon, at the request of B., gave a mortgage on her property, the condition of which was that B. should pay such notes, to which the mortgage was expressly declared to be collateral; *Held* that by this instrument the plaintiff pledged her lands as security for the

debt owing to the mortgagee, and for which both B. and C. were liable; and that the referee correctly found and decided that the plaintiff made and executed the same for the benefit of, and as surety for, both B. and C. as collateral security to the notes as made and indorsed. *ib*

3. *Held, also*, that evidence that B. informed the plaintiff of the facts, applied to her to give the mortgage, expressing the opinion that there was no danger of her losing her property; that he thought he and C. would be able to pay the notes; and telling her how the notes were to be made, &c., was not improper; it not going to contradict or vary the terms or legal effect of the mortgage, as properly construed in the light of conceded and surrounding circumstances. *ib*

PROMISSORY NOTES.

1. Any act of an indorser of a promissory note, calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done, is, in judgment of law, a waiver of demand and notice. *Sheldon v. Horton*, 28
2. Thus, where the holder of a note told the indorser, sixteen days before it fell due, that the maker wanted the note to remain another year, and asked him if he was willing, and the indorser replied that he was willing to let it remain, and at the same time took the note and looked it over, and said it was a good note; *Held* that this excused a demand, and notice of non-payment. *ib*
3. In an action upon a promissory note made by the defendants, payable to the plaintiff or his order, the defendants set up a defense that the note belonged to the plaintiff and one V. as partners, under the firm name of "M. & Co.;" and they set up a counter-claim in their favor against M. & V. as such partners. On the trial they gave evidence tending to show that the money advanced, and for which the note was given, was advanced in pursuance of a contract between them and M. & Co. and was the money of M. & Co.; also to show a breach of the contract by M. & Co. and that damages had accrued to the defendants from such breach. The plaintiff testified that the money advanced was his money, and that the note belonged to him, and V. had no interest in the same or in the money. *Held* that the plaintiff, owning and holding the note in his own right, could maintain an action thereon, in his own name alone, to recover the amount due by its terms. And that if the question of the exclusive ownership of the note by the plaintiff was of any importance, it should have been submitted to the jury; at least the plaintiff should not have been nonsuited on that question. *Mynderse v. Snook*, 234
4. *Held, also*, that the circumstance that the money for which the note was given was advanced upon the contract, did not make it necessary for the parties to the contract to unite in an action upon such note; the contract itself providing that the defendants should give their note for money to be loaned by the plaintiff, without saying to whom the same should be made payable, and the note being severed from the contract, by the act and consent of all the parties, at the time it was executed. *ib*
5. The note, in such a case, is no part of the agreement, but a separate and independent promise made by the defendants in execution and fulfillment, *pro tanto*, of that part of the agreement on their part. *ib*
6. One who indorses commercial paper before maturity, for the accommodation of the payees, without any knowledge of the fact that the note was executed by the makers for the benefit of the payees, upon the faith of a promise by the latter to send the makers paper sufficient to pay the same, and that such promise has been only partially performed, may, after having been compelled to pay the note, recover the amount of the makers. *Watson v. Shuttleworth*, 857
7. A recovery in such an action will not be defeated by the fact that the makers have executed to the plaintiff a voluntary assignment of their property in trust for their creditors, in which the plaintiff is named as a preferred creditor; where it appears that no dividend has been made under such assignment, nor any application made of money realized from the assigned property, upon the plaintiff's claim. *ib*

8. The mere acceptance of such a trust, by the assignee, will not have the effect to suspend his remedy as indorser, against the makers. *ib*
9. The parties to commercial paper are liable in the order in which their names appear upon the same. Hence if a second indorser is compelled to pay the amount, he may recover the same in an action against the makers. *ib*
10. Although the sale of a bid for a contract upon public works is illegal and void, yet if the purchaser gives his note for the purchase money, for the benefit of several persons interested in the bid, and afterwards pays it to one of them, the latter cannot set up the illegality of such sale, to avoid the payment to one of the payees, of his share of the note. *Woodworth v. Bennett*, 861
11. Such a note cannot be enforced, as between the immediate parties to it. The maker can successfully resist the payment thereof; and the defense of the illegality of the transaction out of which the note arose would be a perfect defense to an action brought to collect it, *if seems*. *ib*
12. The defendants, on the transfer of a customer's note to the plaintiff, agreed to indorse it and waive demand and notice, and thereupon made the following indorsement thereon, signed by them, in their firm name: "I waive demand of protest." *Held* that the language of the indorsement might be construed as implying an intention to waive both demand and notice. *Porter v. Kimball*, 467
13. *Also held*, that if the language of the indorsement was too indefinite and uncertain to express a legal contract, the plaintiff might resort to parol evidence to establish one, not inconsistent with the written indorsement. *ib*

See PAYMENT.

PUBLICATION.

See PRACTICE, 10 to 17.

R

RAILROAD COMPANIES.

1. A statute passed in 1866 authorized certain towns to subscribe for

the stock of a railroad company, to such an amount as a majority of the tax paying inhabitants of each town, owning or representing more than one half of the taxable property in said town, as shown by the assessment roll for the year 1865, should fix upon by their assent in writing, or by votes, not exceeding a certain per centage of the assessed valuation of property therein; on condition that such written consent of a majority of the tax payers owning or representing more than one half of the taxable property of said town on the assessment roll for the year 1865, should first be obtained. The written consent of the requisite number of tax payers of one of the towns specified was obtained, for the borrowing on the credit of the town of the sum of \$125,000. But such consent contained the following condition, viz: "This consent is made and signed upon the express condition that said road shall be located and constructed upon a line running through or near the village of E.; thence southerly through the towns of L. and S." A sufficient number of the tax payers of the town in question did not sign an unconditional consent to authorize the commissioners to bond the town and subscribe for stock in said railroad company, pursuant to the statute. *Held* that if the condition annexed to the consent so given rendered the same invalid, it was made valid by a subsequent statute, passed in 1868, which declared, in substance, that consents obtained in pursuance of the act of 1866 should be valid and effectual for all purposes for which they were authorized to be given, and should not be invalidated or avoided, or in any manner affected, by reason of certain specified matters "or for any other error, irregularity, omission or defect," provided a majority of the tax payers should have actually signed or executed such consents. *The People ex rel. Hess v. Clark*, 171

2. *Held, also*, that in an action brought in the name of the people, against the commissioners appointed under the act of 1866 to subscribe for the stock of the railroad company therein mentioned, on behalf of a town, to restrain such commissioners from executing or issuing or disposing of any bonds of said town, in payment

- for stock subscriptions, &c., the railroad company was a necessary party. *ib*
3. That the action being for an alleged wrong, the railroad company was not a defendant, so as to be bound by the proceedings or judgment therein, by merely being named as a defendant in the summons and pleadings. *ib*
4. Such an action cannot be maintained in the name of the people by their attorney general, *it seems*; the people of the state not being interested in the question whether the taxable inhabitants of a particular town should issue bonds of such town to aid in the construction of a railroad. Nor is it authorized by sections 429 to 447 of the Code of Procedure. *ib*
5. In an action against a railroad company, by administrators, to recover damages for the death of their intestate, caused by the alleged wrongful act, neglect, &c. of the defendant, the judge charged the jury that persons approaching a railroad in plain sight are bound to look and see if any train is coming; that if they look up and down the road as men of ordinary prudence would do in traveling near a railroad, and are not negligent, the plaintiffs, in an action against the railroad company, for damages, are entitled to recover, if the persons in charge of the railroad were negligent. *Held* that this was a correct statement of the rule in respect to the conduct of a plaintiff, in such cases. *Havens v. The Erie Railway Company*, 828
6. It is not a question of law how far a man should look, in such a case, but he must use his eyes and his ears, in view of the circumstances, as men of ordinary prudence would do in like cases. And this rule is one for the jury to apply. *ib*
7. It is not error for a judge to refuse to charge that "it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers by." The statute having provided that this—"far enough to warn passers by"—shall be eighty rods, the jury have no right to change the rule as thus fixed. *ib*
8. A railroad company, on purchasing land, has the right to pay a part of the consideration therefor, by keeping open portions of the same as public streets. Hence a condition in the deed that certain portions of the land conveyed shall be kept open as public streets, is not void as imposing a duty or trust upon the corporation inconsistent with its business, and outside of the objects for which it was formed. *Tinkham v. The Erie Railway Company*, 893
9. Where commissioners appointed to appraise land taken by a railroad company, under the statute, for laying its track, awarded to the owner a specified sum, being the value of the land, but refused to increase that amount by allowing consequential damages, based upon the possibility or even probability that the particular business in which he was engaged might be injured, and his property (a flax mill) decreased in value, in consequence of danger to be apprehended from fire emitted from the locomotive engines of the company; *Held* that the commissioners adopted the proper rule of compensation. *Matter of the application of the Union Village and Johnstown Railroad Company*, 457
10. Neither a railroad corporation, nor its directors, have the right to make certificates purporting to represent capital stock, which has not in fact been subscribed and paid for, and to put them on the market and sell them below par. Every paper issued purporting to represent stock which has in fact no existence, is a false certificate; and the directors are not authorized to issue false certificates. Such issues are *ultra vires*. *Fisk v. The Chicago, Rock Island &c. Railroad Company*, 518
11. The act of the directors in issuing such false certificates of stock, cannot be ratified by a subsequent statute, passed by one of the states from which the corporation derives its existence, alone; neither state having exclusive jurisdiction over the corporation. *ib*
12. An injunction should not be issued to restrain the corporation, except so far as the illegal certificates are concerned. The transfer of such certificates may be enjoined, and the proceeds held by the court to protect the company against claims for

damages by the holders of false certificates, or to enable it to retire them. *ib*

See FOREIGN CORPORATIONS.
JURISDICTION.

RECEIVER.

See CORPORATIONS, 7, 8.
INJUNCTION.
PRACTICE, 6, 7, 8, 9.

REFEREE.

1. The opinions advanced in *Woodruff v. Dickie*, (13 How. Pr. 164,) that "a referee is no longer an officer of the court;" that "the court at special term has no more power to grant amendments than the court has on the trial;" and that "a referee has all the powers of a court at special term, to allow amendments," disapproved. *Ford v. Ford*, 525
2. A referee appointed to hear and determine a cause is always under the control and direction of the court, and may be removed at its pleasure. *ib*
3. A referee has no authority, on the trial of an action before him, to make an order allowing an answer to be amended by inserting therein the defense of the statute of limitations. *ib*
4. Although an order thus made is the subject of exception, and may be reviewed on appeal from the judgment entered on the referee's report, the plaintiff is not restricted to that mode of redress. He has the right to seek a more expeditious and less expensive mode. *ib*
5. The special term possesses the power to set aside any order made by a referee, in the progress of a cause, which he had *not authority to make*, and also the power to compel him to proceed to the trial of the issues referred to him for determination. *ib*

REMOVAL OF CAUSE TO UNITED STATES COURT.

1. Where a plaintiff, on an application by the defendants to remove the action to the Circuit Court of the United States, showed that he had had

a domicile in Boston for several years; that last year he purchased a house there, and there his family resided; he coming to the city of New York for the purposes of his business, and returning to his home, in Boston, at intervals, as his occupation permitted; *Held* that he was to be deemed a citizen of Massachusetts. *Fisk v. The Chicago, Rock Island &c. Railroad Company*, 472

2. The inference as to citizenship is strengthened, in such a case, by the fact that the party has not voted in this state, but has done so regularly in another state, since he took up his domicile there several years ago. *ib*
3. What facts will be deemed sufficient to show that a party has not changed his residence from another state to this? *ib*
4. Presumptively, citizenship of a defendant in another state, being once established, still continues; and if the question as to a change of it be in doubt, the doubt must be resolved against the plaintiffs, upon whom is the burthen of overcoming the presumption. *ib*
5. Unless all the plaintiffs be citizens of the state in whose court the action is brought, and all the defendants citizens of a state other than that, the action cannot be removed to a federal court, under the judiciary act of 1789. *ib*
6. Where it appeared that in one of two suits sought to be removed, the plaintiff was a citizen of this state; in the other the plaintiffs were citizens, one of this state, and the others of other states; and in both cases the defendants consisted partly of citizens of this state and partly of citizens of other states; *Held* that the actions could not be removed, under that act. *ib*
7. The acts of congress of 1866 and 1867, in relation to the removal of causes from state courts to United States courts, commented on and construed. *ib*

RESERVATION.

See DEED.

REWARD.*See* ACTION, 5, 6.**S****SOIENTER.***See* DECEIT.**SEPARATION.***See* HUSBAND AND WIFE, 18, 19, 20.**SHERIFF.***See* ACTION, 5, 6, 7.**SPECIAL TERM.***See* REFERENCE, 5.**SPECIFIC PERFORMANCE.***See* VENDOR AND PURCHASER, 8.**STAMPS.**

1. Under the act of congress requiring stamps upon written agreements, &c. approved June 30, 1864, the invalidity of an instrument not stamped, as well as the forfeiture imposed, is made to depend upon the existence of the intent to evade the act. *Hove v. Carpenter*, 882
2. That the parties to an agreement are aware of the requirement of the statute is to be presumed; and their omission to obey it must, in the absence of any explanation, be deemed willful and with intent to evade its requirements. *ib*
3. The act of omitting a revenue stamp is unlawful and injurious to the government, and must be deemed, presumptively, so intended. It comes within the class of cases in which the proof of justification or excuse lies with the party transgressing; and on failure thereof, the law implies a criminal intent. *ib*

STATUTES.

The statements contained in the headings to the chapters, titles and articles into which part 1 of the Revised

Statutes is divided, of the subjects to which they respectively relate, are a part of the law itself, and not in any wise extrinsic to the enacting clause. Their office is solely to control, limit and apply the succeeding provisions of the statute. And effect should be given to them, according to their fair and ordinary import and understanding. *Per* GILBERT, J. *The People v. Molinoux*, 9

See BANKS, 1.

CONSTITUTIONAL LAW.

DEBTOR AND CREDITOR, 1.

OFFICE.

RAILROAD COMPANIES, 1.

REMOVAL OF CAUSE TO U. S. COURT.

STAY OF PROCEEDINGS.

1. A motion for a stay of proceedings in an action, on the ground that another suit is pending which embraces the same matters, will not be granted where the parties to the two actions are not the same, and it does not appear that the entire relief demanded and sought for in the one action could be awarded in the other. *The People v. The Northern Railroad Company*, 98
2. Such a motion is, if not exclusively, certainly to a very great extent, addressed to the discretion of the court at special term; and so far as it is of that character, the decision of the court cannot be overhauled on appeal. *ib*

STOCK.*See* BANKS.**SUBPENA.***See* HUSBAND AND WIFE, 5, 6.**SUPPLEMENTARY PROCEEDINGS.***See* APPEAL, 6.**SUPERVISORS.***See* MANDAMUS, 3.

TAXES AND TAXATION, 8, 9.

SUPREME COURT.

See JURISDICTION.
SURROGATE, 8.

SURROGATE.

1. In order to confer jurisdiction on the court, under the section of the Revised Statutes providing that if an executor or administrator doubt the justice of any claim presented to him, he may enter into an agreement in writing, with the claimant, to refer the matter to referees, to be approved by the surrogate, and that upon filing such agreement and approval with the clerk of the Supreme Court, a rule shall be entered by the clerk, referring the matter to the persons so selected, it is not necessary that there should be a literal compliance with its terms; a substantial compliance is enough. *Bucklin v. Chapin*, 488
2. To give jurisdiction, there must be:
 1. An agreement in writing to refer;
 2. The persons agreed on as referees must be approved by the surrogate;
 3. The agreement and approval must be filed;
 4. A rule referring the claim to the persons indicated must be entered by the clerk of the Supreme Court. *ib*
3. A surrogate made and signed an order in writing, entitled in his court, reciting that the claim of the plaintiff against the estate of C. had been presented to the administratrix and rejected, and the parties had agreed to a reference; and directing that three persons named be and they were thereby appointed referees to hear and determine said claim of the plaintiff; and that such order be entered with the clerk of the county. At the foot of this order was the following consent, signed by the attorneys of the respective parties: "We assent to the above order, and consent that the same be entered." The order, with the consent attached, was then filed by the county clerk and a memorandum of the filing indorsed thereon. *Held*, 1. That the order and consent, taken together, were a sufficient agreement in writing to refer. 2. That there was sufficient evidence that the surrogate approved of the persons named as referees. 3. That the statutory re-

quirement as to the filing of an agreement to refer, was complied with. 4. That if the order referring the claim to the persons named as referees was not entered by the clerk, it could be done *nunc pro tunc*, and should be so entered, to prevent a failure of jurisdiction. 5. That even assuming that the papers were not in conformity to the statute, still the referees acquired jurisdiction to hear, try and determine the matters in controversy between the parties; and that their report was legal and binding on the parties, until it was set aside by the court in some proceeding properly instituted for that purpose. 6. That the Supreme Court had jurisdiction over the claims which were submitted to the referees; in other words, that it had jurisdiction of the subject matter. That by the voluntary consent and appearance of the parties jurisdiction of their persons was obtained; and whenever jurisdiction over both is acquired, the proceedings thereafter are valid, however irregular they may be. 7. That the appearance before the referees, the trial of the claim presented, and report thereon, were all that were necessary to justify the entry of a judgment; that all the preliminary steps might be supplied *nunc pro tunc*. *ib*

See EXECUTORS AND ADMINISTRATORS.

T

TAXES AND TAXATION.

1. Upon the return of a town collector showing that the taxes imposed upon debts owing to non-resident creditors remain unpaid, the statute makes it the duty of the county treasurer, after the expiration of twenty days from the return, to issue his warrant to the sheriff, commanding him to make of the goods and chattels and real estate of such non-residents, the amount of such tax, &c. (*Laws 1851, ch. 871, § 6.*) This is a mere ministerial duty which the statute imposes upon the treasurer, and peremptorily requires him to perform upon the making of the collector's return. He has no discretion to exercise, in the matter, and is invested with, no judicial functions whatever, in regard to it. *The People ex rel. Stephens v. Halsey*, 547

2. He has no power or authority to sit in judgment upon the acts of the assessors of the town, or upon those of the board of supervisors of the county. Nor can he, in answer to an application for a writ of *mandamus*, against him, for refusing to perform his duty, bring their proceedings into review for the purpose of establishing errors or mistakes in such proceedings. *ib*
 3. But want of jurisdiction may be alleged by way of answer to any and all judicial proceedings. Hence the county treasurer may challenge the jurisdiction of any and all of these officers and tribunals to make the assessment, or impose the tax thereon, and show, if he can, that the assessment and the tax are, both, or either, contrary to the statute, and void. *ib*
 4. The assessors are not concluded by the verified statement of the agent of non-resident creditors, made in the prescribed form, of the amount of debts due such non-residents; but if they do not give full credit to such statement, they may go further, and make diligent inquiry for themselves, from the debtors and other sources, and thus ascertain the amount of such indebtedness from solvent debtors. *ib*
 5. And having jurisdiction to make further inquiries and investigations upon that point, their errors and mistakes, whatever they may have been, cannot be brought in question and reviewed on application for a *mandamus*. *ib*
 6. Jurisdiction being established, a tax, founded upon the assessment, has all the force and vigor of a judicial sentence, importing absolute verity, notwithstanding such mistakes and errors. *ib*
 7. Whenever claims in respect to assessments for taxes upon United States bonds, stocks or securities exempt from taxation, are presented to the board of supervisors of either of the counties mentioned in the act of May 17, 1867, (*Laws of 1867, ch. 938*.) it is the duty of the board to hear and determine such claim, and to repay to the claimant the amount collected or paid upon such assessment, by levying the same by tax upon the taxable property of the county. *The People ex rel. The Central Bank of Cherry Valley v. The Board of Supervisors of Otsego County, 564*
 8. The act is mandatory and imperative upon the board of supervisors to determine the amount of taxes the claimants have paid by reason of assessments upon such exempt property, and to cause such amounts of taxes to be collected and repaid, in the manner prescribed in said act. It is not discretionary with them to cause such taxes to be repaid, or to refuse to do so. *ib*
 9. The first duty imposed upon a board of supervisors, by the law of 1867, is to ascertain and determine whether the applicants were assessed, and whether they paid taxes as stated in their claims, and if they paid any such taxes, the amounts thereof. *ib*
- See ACTION.*
MANDAMUS, 1.
- TENDER.*
See EQUITABLE DEFENSE.
- TITLE TO LAND.*
See COSTS, 2, 3.
JUSTICE'S COURT, 2.
- TOWNS.*
See RAILROAD COMPANIES, 1, 2, 3, 4.
- U**
- USAGE.*
See CARRIERS, 5, 6.
- USURY.*
See LEX LOCI CONTRACTUS.
MORTGAGE, 6.
- V**
- VENDOR AND PURCHASER.*
1. A vendee will not be deemed to have assented to a contract for the sale of land, which is binding on one

of two vendors, only. And the contract being, for that reason, not binding upon him, at the time it was signed, he cannot make it a valid agreement as to one vendor only, by assenting to it as such a contract, afterwards. *Snyder v. Neefus*, 68

2. Upon a sale of lots belonging to the defendants, by the commissioners of the sinking fund, in April, 1852, the terms of sale were—ten per cent to be paid in cash, with expenses of the sale, immediately; fifteen per cent to be paid on the 1st of May, 1852, when the deed was to be delivered; and the remaining seventy-five per cent to be secured by bond and mortgage for five years. K. & B. purchased twelve of the lots, at said sale, upon the above terms, and paid ten per cent of the purchase money and expenses of sale, but failed to pay the fifteen per cent, and execute a mortgage for the remainder of the purchase money, on the 1st of May. On the 16th of December, 1852, they assigned their bid to the plaintiffs, and the comptroller of the city promised that, upon payment of the fifteen per cent, and the execution of a mortgage for the balance by the plaintiffs, the property would be conveyed to them. *Held* that the defendants were bound by this arrangement between the plaintiffs and the comptroller; and that by such arrangement the default of K. & B. in not paying the fifteen per cent on the 1st of May, and giving their bond and mortgage for the remainder of the purchase money, was *waived* by the defendants. *Miller v. The Mayor &c. of the City of New York*, 658

3. And the plaintiffs having, in reliance upon this arrangement, paid to K. & B. the ten per cent and the auctioneer's fees; *Held* that they were entitled to a specific performance of the contract of sale. *ib*

4. *Held, also*, that a delay which subsequently took place, until August, 1853, when the plaintiffs tendered the amount of purchase money due, with interest, having occurred by mutual consent of the plaintiffs and the comptroller, from time to time, without any fault of the plaintiffs, the defendants were bound by the action of the comptroller, in the matter of postponing the delivery

of the deed; and that the statute of limitations did not commence running against the plaintiffs until the refusal of the comptroller to deliver the deed, in August, 1853. *ib*

See DAMAGES.

- EJECTMENT, 5, 6, 7.
- FRAUDE, STATUTE OF, 1, 4.
- PAYMENT, 7.
- PRINCIPAL AND AGENT, 2.

W

WAIVER.

See APPEAL, 5.

- PROMISSORY NOTES, 1, 12.
- VENDOR AND PURCHASER, 2.

WAREHOUSEMEN.

Where warehousemen refuse to deliver up property in their charge, on demand of possession and tender of all legal charges, claiming an additional sum beyond their legal charges, an action will lie, by the owner, to recover the possession. *Risley v. Squier*, 280

WARRANTY.

1. During a negotiation between the plaintiffs and defendants, for the purchase of a number of cows by the former, of the latter, one of the plaintiffs told one of the defendants that he wanted to know if the cows were all right—all perfect—and when they were coming in; that the plaintiffs wanted them to take back into the country to sell to dairymen, to fill in where their cows were farrow and old, &c.; that they must know whether they were all coming in in good season, as they had to warrant them coming in, and wanted them perfect every way, &c. The defendant said they were all coming in in good season but one, &c. *Held*, that the jury had a right to find, from this evidence, that the defendants warranted the cows to be with calf, except one, at the time of the sale, and that the times when they became with calf were of such dates that they would come in in good season the following spring, for

dairy cows. That it was not necessary for the defendants to say they warranted the cows, to make them liable for a warranty on them. *Richardson v. Mason*, 601

2. *Held, also*, that the assertion of the defendant that the cows "were all coming in in good season in the spring, but one," being positive and unequivocal, the plaintiffs had the right to rely on it as the absolute assertion of a fact, and not the mere expression of an opinion. *ib*
3. The authorities are numerous that such an assertion may be held by a jury to constitute a warranty. *ib*
4. *Held, further*, that the objection that the action was commenced before the time arrived at which the defendants warranted the cows would have calves, even if it had been raised at the trial, would have been unavailable to the defendants; for the reason that if the cows were not with calf at the time of the sale, the warranty was broken at the time the action was commenced. And that the time when the cows were to come in, according to the warranty, having passed at the time of the trial, there was no difficulty then in establishing the alleged breach of the warranty. *ib*
5. The plaintiffs having, after their purchase of the cows, sold some of them to a third person, the latter, on being cross-examined as a witness, stated that the plaintiffs warranted the cows to him for four weeks. He was then asked, "Are we to understand by the warranty made to you by the plaintiffs on the sale of these cows, that if they appeared to be with calf, by not being a bulling within four weeks, that was to be an end of the warranty?" The question was objected to on the ground that the witness had stated what the

warranty was, and that he should give the facts, and not his opinion. The objection was sustained. *Held*, that the ruling was correct, for the reasons stated in the objection, and also for the reason that the evidence sought for was immaterial to the issue. *ib*

6. The judge denied the request of the defendants' counsel, to charge the jury that so far as it appeared to them that any of the cows were sold by the plaintiffs to third persons, warranted only for four weeks, or any other limited time, and there was no breach of warranty within that time, the plaintiffs could not recover for them in this action, though such cows ultimately did not come in. *Held*, that the request was properly refused. *ib*
7. *Held, also*, that the plaintiffs were entitled to recover the difference between the value of the cows, if they had been in the condition the defendants warranted they were, and their value in the condition they in fact were at the time the plaintiffs purchased them. *ib*

WILL.

Construction of, in particular cases.

A testator, by his will devised and directed as follows: "I wish my personal and real estate to be appropriated equally to the benefit of my wife Emily, and of my [two] children," (naming them.) *Held* that the persons named took *per capita*, and not *per stirpes*, and therefore each was entitled to one third of the residue of the estate after the dower interest of the widow was satisfied. *Seabury v. Brewer*, 662

See also *Larkin v. Mann*, 267
Cole v. Cole, 607



HARVARD L